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Supreme Court, U.S.
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In The

Supreme Court of the United States

GARY HOWSAM, a Canadian national and GREENLIGHT FILM & TELEVISION INC., an Ontario, Canada corporation,

Petitioners,

v.

SUPERIOR COURT OF THE COUNTY OF LOS ANGELES,

Respondent,

COMERICA BANK, a Michigan corporation,

Real Party In Interest.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is it fair and reasonable for California to exercise personal jurisdiction over international parties based solely upon allegations of imputed conduct, such as alter ego or conspiracy, and thereby, supersede integrated contractual arrangements that did not provide for jurisdiction in the forum state against the international parties, where said parties otherwise have insufficient minimum contacts with the forum to be subject to its jurisdiction?

PARTIES TO PROCEEDING

Pursuant to Rule 14.1(b), the following is a list of all parties named in the action: Gary Howsam, a Canadian national, Greenlight Film & Television Inc., a Canadian corporation, Janus Productions Inc., a Canadian corporation, GFT-Going Back Films Inc., a Canadian corporation, GFT/Redwood KOTN Films Inc., a Canadian corporation, GFT Heresy Films Inc., a Canadian corporation, GFT Circle Films Inc., a Canadian corporation, GFT Road Rage Films Inc., a Canadian corporation, GFT/Redwood Ignition Films Inc., a Canadian corporation, GFT Entertainment Inc., a Canadian corporation, Michelle Glockler, a California resident, Adam Bennecke, a California resident.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that the parent corporation of Petitioner Greenlight Film & Television Inc., is CPC Communications Inc., an Ontario, Canada private corporation. No public company holds any of Petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Gary Howsam and Greenlight Film & Television Inc. respectfully petition for a writ of certiorari to review the denial of a petition for review to the Supreme Court of California.

OPINIONS BELOW

The denial of review by the Supreme Court of California is included in the Appendix at p. 1. The denial without opinion of Petitioners' writ of mandate to the Court of Appeal of the State of California, Second Appellate District is included in the Appendix at p. 3. The minute order of the Superior Court for the County of Los Angeles denying Petitioners' motion to quash service of summons for lack of personal jurisdiction and motion to dismiss on grounds of forum non conveniens is included in the Appendix at p. 5. The Reporter's Transcript of proceedings and oral argument before the Superior Court is included in the Appendix at pp. 82-107.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. A petition for review to the California Supreme Court was denied on July 13, 2005. App. at p. 1. The federal issue raised by Petitioners relates to the application of California's long-arm statute which permits a court to exercise personal jurisdiction over a nonresident defendant to the full extent permitted by the Due Process Clause of the United States Constitution. (Cal. Code Civ. Proc. § 410.10).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Fourteenth Amendment: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Cal. Code Civ. Proc. § 410.10: Jurisdiction exercisable: A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.

Cal. Code Civ. Proc. § 418.10: Notice of motion to quash service or to stay or dismiss action; Petition for writ of mandate, and responsive pleading; Default and general appearance:

(a) A defendant, on or before the last day of his or her time to plead or within any further time that the court may for good cause allow, may serve and file a notice of motion for one or more of the following purposes:

(1) To quash service of summons on the ground of lack of jurisdiction of the court over him or her.

(2) To stay or dismiss the action on the ground of inconvenient forum.

(3) To dismiss the action pursuant to the applicable provisions of Chapter 1.5 (commencing with Section 583.110) of Title 8.

(b) The notice shall designate, as the time for making the motion, a date not more than 30 days after filing of the notice. The notice shall be served in the same manner, and at the same times, prescribed by subdivision (b) of Section 1005. The service and filing of the notice shall extend the defendant's time to plead until 15 days after service upon him or her of a written notice of entry of an order denying his or her motion, except that for good cause shown the court may extend the defendant's time to plead for an additional period not exceeding 20 days.

(c) If the motion is denied by the trial court, the defendant, within 10 days after service upon him or her of a written notice of entry of an order of the court denying his or her motion, or within any further time not exceeding 20 days that the trial court may for good cause allow, and before pleading, may petition an appropriate reviewing court for a writ of mandate to require the trial court to enter its order quashing the service of summons or staying or dismissing the action. The defendant shall file or enter his or her responsive pleading in the trial court within the time prescribed by subdivision (b) unless, on or before the last day of the defendant's time to plead, he or she serves upon the adverse party and files with the trial court a notice that he or she has petitioned for a writ of mandate. The service and filing of the notice shall extend the defendant's time to plead until 10 days after service upon him or her of a written notice of the final judgment in the mandate proceeding. The time to plead may for good cause shown be extended by the trial court for an additional period not exceeding 20 days.

(d) No default may be entered against the defendant before expiration of his or her time to plead, and no motion under this section, or under Section 473 or 473.5 when joined with a motion under this section, or application to the court or stipulation of the parties for an extension of the time to plead, shall be deemed a general appearance by the defendant.

(e) A defendant or cross-defendant may make a motion under this section and simultaneously answer, demur, or move to strike the complaint or cross-complaint.

(1) Notwithstanding Section 1014, no act by a party who makes a motion under this section, including filing an answer, demurrer, or motion to strike constitutes an appearance, unless the court denies the motion made under this section. If the court denies the motion made under this section, the defendant or cross-defendant is not deemed to have generally appeared until entry of the order denying the motion.

(2) If the motion made under this section is denied and the defendant or cross-defendant petitions for a writ of mandate pursuant to subdivision (c), the defendant or cross-defendant is not deemed to have generally appeared until the proceedings on the writ petition have finally concluded.

(3) Failure to make a motion under this section at the time of filing a demurrer or motion to strike constitutes a waiver of the issues of lack of personal jurisdiction, inadequacy of process, inadequacy of service of process, inconvenient forum, and delay in prosecution.

STATEMENT OF THE CASE

A. Background

In this case, Comerica Bank, a Michigan corporation seeks to recover repayment of certain loans it made to several of the defendants as part of the co-financing for the production of seven feature films (the "Films"). The Films were produced in Canada or co-produced in Canada and the United Kingdom by Canadian corporations and were to be distributed in foreign countries.

Petitioners are challenging California's exercise of personal jurisdiction over them as they do not have a presence in California for purposes of general personal jurisdiction and were not parties to, or guarantors of the loans for purposes of specific jurisdiction.

California purports to exercise personal jurisdiction over the Petitioners based solely on imputed conduct consisting of conclusory allegations of alter ego and conspiracy.

1. Real Party In Interest

Real Party in interest is Comerica Bank, a Michigan banking corporation.

Comerica Bank has maintained an active presence in Canada since 1996, with its Canadian Headquarters located in Toronto, Ontario, Canada. Comerica Bank provides a wide range of corporate banking services to Canadian companies and subsidiaries of U.S. companies carrying on business in Canada. See, www.comerica.com: North American Services.

Comerica Bank-Canada was a foreign bank subsidiary of Comerica Bank listed on Schedule II of the Bank Act (Canada) (the "Canadian Bank Act"). See, Order of the Ontario Securities Commission, In the Matter of Commodity Futures Act R.S.O. 1990 Chapter S. 20 as Amended and In the Matter of Comerica Bank dated, August 17, 2001. Pursuant to amendments made to the Canadian Bank Act in 1999, Comerica Bank-Canada applied to become a Schedule III foreign bank subsidiary under the Canadian Bank Act authorized to carry on banking activities through branches in Canada. On October 1, 2001, Comerica Bank-Canada transferred its assets to, and had its deposit liabilities assumed by a newly established Canadian branch of its parent, Comerica Bank, and Comerica Bank-Canada ceased accepting deposits. See, Announcement of the Canadian Deposit Insurance Company dated January 8, 2002. Comerica Bank now operates as a foreign bank subsidiary in Canada in accordance with the Canadian Bank Act.

Through its Comerica Entertainment Group, Comerica Bank touts itself as a leader in international entertainment industry lending. See, www.comerica.com-entertainment. Comerica Entertainment Group asserts that it has built a strong presence outside the United States, supporting entertainment communities in Europe, Canada and the Pacific Rim. Comerica Bank affiliates span the globe and include Independent Film Financing Inc. in Canada and Australia, Benfield Imperial Entertainment Finance in the United Kingdom, Media Entertainment Funding GmbH in Germany and Asia Entertainment Finance Associates in Asia. Comerica's affiliate offices assist domestic and international clients such as independent film producers and foreign and

domestic sales agents with co-production, interim and gap financing for film and television projects abroad. See, www.iff.ca. Comerica's affiliate, Independent Film Financing, Inc., is the exclusive Canadian representative of Comerica Entertainment Group in Canada, and is headquartered in Toronto, Ontario. *Id.*

Comerica Bank provided a portion of the financing for the production of the Canadian Films at issue. The balance of the financing was to be provided by third parties including foreign distributors. The Comerica loan obligations were secured by the Films and all the proceeds and revenue to be derived from the Films.

2. Contracting Defendants

The "Contracting Defendants" are special purpose entities incorporated in Canada that were set up at the behest of Comerica Bank as conditions precedent to its funding of the loans. They are defendants: Janus Productions, Inc., GFT-Going Back Films, Inc., GFT/Redwood KOTN Films, Inc., GFT Heresy Films, Inc., GFT Circle Films, Inc., GFT Road Rage Films, Inc. and GFT/Redwood Ignition Films Inc.

The Contracting Defendants are the named borrowers on all the Comerica Bank loans at issue. The Contracting Defendants are the parties to the loan agreements, security agreements, interparty agreements, distribution agreements, assignments and various other documents that Comerica Bank required to be executed before funding the loans.

The establishment of such special purpose entities is customary in the film industry. They are created to meet

specific lending requirements to hold the rights to each individual Film in order to establish a single entity that controls the rights to the film, including the copyright, and to facilitate assignments and conveyances of the film rights and to enable the film production company to establish bank accounts and to receive and disburse funds. In the event of a shortfall, the rights held by the special purpose entity is the collateral upon which Comerica Bank can foreclose. The loan documents provide for jurisdiction and venue over the special purpose entities in California.

3. Petitioners

Comerica has also named Petitioner Gary Howsam ("Howsam"), a Canadian national and Petitioner Greenlight Film & Television Inc. ("GFTI") an Ontario, Canada corporation with its principal place of business in Toronto, Ontario, as defendants. Howsam is the President of GFTI. App. at p. 108: Howsam Decl., ¶ 2.

Although Howsam is an officer of the special purpose entities, it is undisputed that neither Howsam individually, nor GFTI, ever entered into any written agreement with Comerica Bank. App. at p. 109: Howsam Decl., ¶ 10. Comerica Bank did not require Howsam, individually, or GFTI, to sign as parties to any loan document, security agreement, interparty agreement, distribution agreement, assignment or any other agreement of any kind. Nor did Comerica require Howsam individually, or GFTI, to sign personal guarantees or any other security agreement or document evidencing their personal responsibility for repayment of the loans. Neither Howsam nor GFTI ever consented expressly or impliedly in any way to personal jurisdiction in California as a condition precedent to

Comerica Bank funding any of the loans. GFTI is not and has never been qualified to do business in the State of California. None of GFTI's officers or directors, including Howsam, resides or is domiciled in the State of California. GFTI has no employees residing or domiciled in California. GFTI has no branch office or comparable facilities in California, and has no telephone listings or mailing addresses in California. No meetings of GFTI's board of directors or shareholders have been held in California and none of its officers or directors has attended business conferences in such capacities within the State of California. Neither GFTI nor Howsam maintain any bank accounts or other tangible personal or real property in the State of California. GFTI does not direct any of its advertising specifically toward California residents nor does it advertise in publications that are directed primarily toward California residents. All of the books and records of GFTI and Howsam are located in Toronto, Ontario, Canada. App. at pp. 108-09: Howsam Decl., ¶¶ 3-10.

4. Comerica's Allegations of Fraud

At issue in this case is whether certain minimum guarantee agreements provided from foreign distributors in Italy, France, Germany, Greece, Mexico, Brazil and other foreign countries to Comerica Bank through a sales agent were forged or fraudulent. Comerica Bank contends that obtaining these minimum guarantee agreements from these foreign distributors were conditions precedent to Comerica's funding the loans.

Comerica Bank alleges that the special purpose entities entered into a Sales Agent Agreement with third party Hilltop Entertainment LLC that employed defendant

Glocker. Hilltop Entertainment LLC is in bankruptcy, so Comerica contends that Glocker, individually, conspired with *Comerica Bank's own employee Bennecke* and Howsam to submit to Comerica fraudulent minimum guarantee agreements from the foreign distributors to obtain the Comerica loans.

However, it is undisputed that neither Howsam nor anyone acting on GFTI's behalf actually submitted the allegedly fraudulent foreign distributor minimum guarantee agreements at issue to Comerica Bank. Thus, Comerica seeks to assert personal jurisdiction over Petitioners based solely on imputed conduct consisting of conclusory allegations of alter ego and conspiracy.

B. Proceedings in the California Courts

On October 27, 2004, Howsam and GFTI specially appeared in the underlying action and moved to quash service of summons for lack of personal jurisdiction and forum non conveniens. A federal jurisdictional issue was raised because a state court's assertion of personal jurisdiction over a nonresident defendant who has not been served with process within the state must comport with the requirements of the due process clause of the federal Constitution, citing among others, *Burger King v. Rudzewicz*, 471 U.S. 462 [85 L. Ed. 2d 528, 540, 105 S. Ct. 2174] (1985) and *Vons Companies, Inc. v. Seabest Foods, Inc.*, 14 Cal. 4th 434, 444-45 [58 Cal. Rptr. 2d 899, 926 P.2d 1085] (1996) (*Vons*). App. at pp. 74-75: Motion to quash.

On December 15, the trial court heard the motion to quash filed by Howsam and GFTI and took it under submission. App. at pp. 81-106: Reporter's Transcript. Later that day, the trial court issued its minute order.

App. at pp. 5-10. *The Superior Court sustained objections to Comerica's conclusory allegations of conspiracy as speculation and lacking any foundation as against Petitioners.* App. at p. 8: minute order. Nevertheless, the trial court denied Petitioners' motion to quash finding that the allegations were insufficient to establish general jurisdiction, but found "specific" jurisdiction based upon imputed conduct under an alter ego theory. App. at pp. 6-7.

Petitioners timely filed a Petition For Writ of Mandate, Prohibition or Other Appropriate Relief with the Second District Court of Appeal of California from the denial of their motion to quash on January 6, 2005. App. at pp. 27-64. The federal issue was raised by Petitioners' argument: "Where as here, personal jurisdiction 'is challenged by a non-resident (in this case foreign) defendant(s), the burden of proof is upon the Plaintiff to demonstrate that 'minimum contacts' exist between defendant and the forum state to justify imposition of personal jurisdiction.'" App. at p. 47: Writ of mandate. The Court of Appeal denied the requested relief on April 14, 2005 in a two-line Order. App. at p. 3.

Petitioners then filed a petition for review with the California Supreme Court. App. at pp. 11-26. The petition for review raised the issues of personal jurisdiction and minimum contacts citing *Sonora Diamond Corp. v. Superior Court*, 83 Cal. App. 4th 523, 535 [99 Cal. Rptr. 2d 824] (2000) which acknowledges that Code of Civil Procedure Section 410.10 permits California courts to exercise jurisdiction on any basis not inconsistent with state or federal constitutional principles, and noting that the federal constitutional principles governing jurisdiction are represented by the legal shorthand references *minimum*

contacts, International Shoe, and *World-Wide Volkswagen* which are familiar to every law student. See, App. at p. 17. The California Supreme Court denied review of Petitioners' petition. App. at p. 1.

STATEMENT OF REASONS FOR GRANTING THE WRIT

The Court should grant this petition for certiorari because it raises unique issues of international sovereignty, comity, jurisdiction and conflict of laws between the United States and Canada. Moreover, the notion of excising specific jurisdiction based solely on imputed conduct eviscerates the jurisdictional concept of fair warning which is intended to give "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 [62 L. Ed. 2d 490, 100 S. C 559] (1980).

A. Summary of Argument

Minimum contacts exist where the defendant's conduct in the forum state is such that he should reasonably anticipate being subject to suit there, and it is reasonable and fair to force him to do so. Contractual arrangements between international parties concerning issues of personal jurisdiction should be respected absent a compelling reason to disregard them. By requiring that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," [*Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring

in judgment)], the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297.

World-Wide Volkswagen's concept of fair warning is particularly applicable to disputes involving foreign nationals. This Court has long recognized the unique and substantial burdens placed upon foreign nationals defending themselves in a foreign country. This Court has held that such circumstances should carry significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders. In every case of an international defendant, the procedural and substantive interests of other nations in a state court's assertion of jurisdiction, as well as the "Federal interests in Government's foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State. 'Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.'" *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 115 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987); quoting *United States v. First National City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting).

Moreover, the sole basis for jurisdiction in California emanates from the jurisdiction and venue provisions included in the bank's loan and security agreements, *but Petitioners are not parties to any of those agreements.*

Specific jurisdiction here is being asserted based solely on imputed conduct, even though Petitioners purposefully structured their transactions with Comerica to do business in Canada, not subject themselves to personal jurisdiction in California. There was no fraud involved with Petitioners' use of their corporate structure here, as Comerica was fully aware of the relationships between the Petitioners and the Contracting Defendants at the time the loans were funded. Comerica could have demanded that Petitioners consent to personal jurisdiction in California as a condition to funding the loans, or demanded that Petitioners provide personal guarantees for repayment of the loans, but Comerica failed to obtain such agreements from Petitioners. Under such circumstances, it would be unreasonable to subject Petitioners to jurisdiction in California based solely upon a theory of alter ego. The imposition of liability through alter ego should be used sparingly based upon equitable considerations to prevent fraud and injustice caused by abuses of the corporate form. It should not be imposed simply as a substitute for Comerica's failure to obtain personal guarantees from the Petitioners by contract.

Given the weakness of Comerica's potential contract remedies against Petitioners, Comerica alleges an elaborate tort theory of conspiracy to defraud involving the Petitioners and the bank's *own employee* as justification to impose personal jurisdiction (and personal liability in tort) over Petitioners. *The Superior Court, however, sustained objections to Comerica's conspiracy allegations as being based on speculation and lacking any foundation.* App. at p. 8: minute order. Moreover, California law does not recognize allegations of conspiracy as a basis for acquiring personal jurisdiction over a party. Personal jurisdiction

over any nonresident defendant must be premised upon forum-related acts personally committed by the individual. Imputed conduct is a connection too tenuous to warrant the exercise of personal jurisdiction. *Edmunds v. Superior Court*, 24 Cal. App. 4th 221, 233 [29 Cal. Rptr. 2d 281] (1994); see also, *Mansour v. Superior Court* (1995), 38 Cal. App. 4th 1750, 1758 [46 Cal. Rptr. 2d 191]; *Kaiser Aetna v. Deal*, 86 Cal. App. 3d 896, 901 [150 Cal. Rptr. 615] (1978).

Even assuming Comerica met its burden of showing Petitioners' minimum contacts with California, subjecting Petitioners to suit in California would be unreasonable and would offend traditional notions of fair play and substantial justice. Comerica's contacts with Canada are far more substantial than any contacts Petitioners may have with California. Comerica is a Michigan bank with a chartered subsidiary bank in Canada which is subject to Canadian regulatory banking laws. It has Canadian headquarters in Toronto, and has purposefully injected itself into the international film production and financing industry based in Toronto, an industry in which the Canadian government has a substantial interest. The transactions here involve films produced in Canada and the UK for primarily international distribution. The allegations of fraud at issue against Petitioners, if they occurred at all, occurred in Canada and involve foreign nationals and foreign distribution rights in the UK, Italy, France, Germany, Greece, Mexico, Brazil and other foreign countries.

In sum, Comerica could have required that Petitioners submit to jurisdiction in California as a condition precedent to funding the loans, but did not do so. To assert jurisdiction over a foreign national and foreign corporation that has purposefully sought to do business in Canada and

not the forum of California based solely upon imputed conduct violates traditional notions of fair play and substantial justice.

B. Imputed Conduct is a Connection Too Tenuous to Warrant the Exercise of Specific Personal Jurisdiction over an International Party and International Corporation that Purposefully Structured its Transactions to Do Business in Canada with Plaintiff and to Avoid Subjecting Themselves to Jurisdiction in California

California's long-arm statute authorizes California courts to exercise jurisdiction on any basis not inconsistent with the Constitution of the United States or the Constitution of California. Cal. Code Civ. Proc. § 410.10; *Vons*, 14 Cal. 4th at 444-45.

"The Due Process Clause of the Fourteenth Amendment operates as a limitation on the jurisdiction of state courts to enter judgments affecting rights or interests of nonresident defendants." *Shaffer v. Heitner*, 433 U.S. 186, 198-200 (1977).

A state court's assertion of personal jurisdiction over a nonresident defendant who has not been served with process within the state comports with the requirements of the Due Process clause of the federal Constitution if the defendant has such minimum contacts with the state that the assertion of jurisdiction does not violate "'traditional notions of fair play and substantial justice.'" *Vons*, 14 Cal. 4th at 444-45, citing *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95 (1945).

Minimum contacts exist where the defendant's conduct in the forum state is such that he should reasonably anticipate being subject to suit there, and it is reasonable and fair to force him to do so. *World-Wide Volkswagen*, 444 U.S. at 297. By requiring that individuals have "fair warning" that a particular activity may subject them to the jurisdiction of a foreign sovereign, the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297.

World-Wide Volkswagen's concept of fair warning is particularly applicable to disputes involving foreign nationals. This Court has long recognized the unique and substantial burdens placed upon foreign nationals defending themselves in a foreign country. This Court has held that such circumstances should carry significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders. In every case of an international defendant, the procedural and substantive interests of other nations in a state court's assertion of jurisdiction, as well as "the Federal interests in Government's foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State. 'Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.' *United States v. First National City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)." *Asahi Metal*, 480 U.S. at 115.

Nevertheless, a nonresident defendant may be subject to the general jurisdiction of the forum if his or her contacts in the forum state are "substantial . . . continuous and systematic." *Perkins v. Benguet Mining Co.*, 342 U.S. 437, 445-446 [96 L. Ed. 485, 492, 493, 72 S. Ct. 413] (1952); see also, *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 414-415 [80 L. Ed. 2d 404, 410-411, 104 S. Ct. 1868] (1984). In such a case, "it is not necessary that the specific cause of action alleged be connected with the defendant's business relationship to the forum." *Helicopteros*, 466 U.S. at 414. Such a defendant's contacts with the forum are so wide-ranging that they take the place of physical presence in the forum as a basis for jurisdiction. *Burnham v. Superior Court*, 495 U.S. 604, 618-619 [109 L. Ed. 2d 631, 644-645, 110 S. Ct. 2105] (1990) (plur. opn. by Scalia, J.)

Here, the Superior Court found that Petitioners' contacts with California were not sufficiently substantial or systematic to establish general jurisdiction. See, App. at pp. 6-7. Hence, Comerica Bank has to establish specific jurisdiction over Petitioners.

"Specific jurisdiction" is jurisdiction which arises when a defendant's contacts with the forum state are the activities giving rise to the litigation. *Burger King*, 471 U.S. at 477-478. "When determining whether specific jurisdiction exists, courts consider the 'relationship among the defendant, the forum, and the litigation.'" *Helicopteros*, 466 U.S. at 414, quoting *Shaffer*, 433 U.S. at 204.

This Court has described the forum contacts necessary to establish specific jurisdiction as involving variously a nonresident who has "purposefully directed" his or her activities at forum residents [*Burger King*, 471 U.S. at

471-472], or who has "purposefully derived benefit" from forum activities (*Id.* at p. 473), or "purposefully avail[ed himself or herself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* at p. 475. The Court also has referred to the requisite forum contact as involving a nonresident defendant who "'deliberately' has engaged in significant activities with a State [citation] or has created 'continuing obligations' between himself and residents of the forum [citation]" (*Id.* at 475-476), concluding that in such cases the defendant "manifestly has availed himself of the privilege of conducting business [in the forum], and because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." *Id.* at p. 476.

California and the Ninth Circuit hold that a court may exercise specific jurisdiction over a nonresident defendant only if: (1) the defendant has purposefully availed himself or herself of forum benefits (*Vons*, supra, 14 Cal. 4th at p. 446); (2) the controversy is related to or arises out of the defendant's contacts with the forum (*Id.*, quoting *Helicopteros*, 466 U.S. at p. 414); and (3) the assertion of personal jurisdiction would comport with fair play and substantial justice (*Vons*, 14 Cal. 4th at p. 447, quoting *Burger King*, 471 U.S. at 472-473; see, *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000); *Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1485 (9th Cir. 1993).

The requirement of purposeful availment "ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts or of *the unilateral activity of another party or third person.*"

McGlinchy v. Shell Chemical Co., 845 F.2d 802, 816 n. 9 (9th Cir. 1988). A defendant must, by his *own actions*, create a "substantial connection" to the forum state. *Burger King*, 471 U.S. at 475.

Here, Petitioners were not parties to the loan agreements and other contracts at issue.[1] They are being haled into a California court based solely on imputed conduct, even though Petitioners purposefully structured their transactions with Comerica to avoid subjecting themselves to personal jurisdiction in California. Allegations of imputed conduct are simply insufficient to establish specific jurisdiction over a foreign defendant in such circumstances.

Under California law, a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations. *Communist Party v. 522 Valencia, Inc.*, 35 Cal. App. 4th 980, 993 [41 Cal. Rptr. 2d 618] (1995); *Robbins v. Blecher*, 52 Cal. App. 4th 886, 892 [60 Cal. Rptr. 2d 815] (1997).

Under California law, a corporate identity may be disregarded – the "corporate veil" pierced – only where an abuse of the corporate privilege justifies holding the equitable ownership of a corporation liable for the actions of the corporation. *Roman Catholic Archbishop v. Superior Court*, 15 Cal. App. 3d 405, 411 [93 Cal. Rptr. 338] (1971).

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[1] Indeed, even a contract between an out-of-state party and a resident of the forum state cannot, standing alone, establish sufficient minimum contacts with the forum under *Burger King*, 471 U.S. at 473.

In California, two conditions must be met before the alter ego doctrine will be invoked.[3] First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone. *Automotriz etc. De California v. Resnick*, 47 Cal. 2d 792, 796 [306 P.2d 1, 63 A.L.R.2d 1042] (1957); *Hennessey's Tavern, Inc. v. American Air Filter Co.*, 204 Cal. App. 3d 1351, 1358 [251 Cal. Rptr. 859] (1988).

Here, there was no fraud involved with Petitioners' use of their corporate structure, as Comerica itself required that the special purpose entities be formed and was fully aware of the relationships between the Petitioners and the Contracting Defendants at the time the loans were funded. Comerica could have demanded that Petitioners consent to personal jurisdiction in California as a condition to funding the loans, or demanded that Petitioners provide personal guarantees for repayment of the loans, but Comerica failed to obtain such standard agreements from Petitioners.

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[3] Of note, California legal standards for piercing the corporate veil would not even apply here. Generally speaking, only the laws of the jurisdiction of incorporation of a foreign corporation shall govern the liability, if any, of shareholders of the foreign corporation for the debts, liabilities, and obligations of the foreign corporation for which they are not otherwise liable by statute or agreement. For example, under the Ontario Business Corporations Act, R.S.O. 1990, Chapter B. 16: "The shareholders of a corporation are not, as shareholders, liable for any act, default, obligation or liability of the corporation except under subsection 34(5), subsection 108 (5) and section 243. R.S.O. 1990, c. B. 16, s. 92(1)."

The imposition of liability through alter ego should be used sparingly based upon equitable considerations to prevent fraud and injustice caused by abuses of the corporate form. It should not be imposed simply as a substitute for Comerica's failure to obtain personal guarantees from the Petitioners by contract.

Here, it is not inequitable to respect the corporate separateness of Petitioners. Indeed, it would be unreasonable to subject Petitioners to jurisdiction in California based solely upon a theory of alter ego given Comerica's knowledge of Petitioners' corporate structure and its own requirements in the loan documents to the creation of the separate special purpose entities.

Given the weakness of Comerica's potential contract remedies against Petitioners, Comerica alleges a tort theory of conspiracy to defraud involving the Petitioners and *the bank's own employee* as justification to impose personal jurisdiction (and personal liability in tort) over Petitioners. *The Superior Court, however, sustained objections to Comerica's conspiracy allegations as being based on speculation and lacking any foundation.* App. at p. 8: minute order.

Moreover, California law does not recognize allegations of conspiracy as a basis for acquiring personal jurisdiction over a party. Personal jurisdiction over any nonresident defendant must be premised upon forum-related acts personally committed by the individual. Imputed conduct is a connection too tenuous to warrant the exercise of personal jurisdiction. *Edmunds v. Superior Court*, 24 Cal. App. 4th 221, 233 [29 Cal. Rptr. 2d 281] (1994); see also, *Mansour v. Superior Court*, 38 Cal. App. 4th 1750, 1758 [46 Cal. Rptr. 2d 191] (1995); *Kaiser*

Aetna v. Deal, 86 Cal. App. 3d 896, 901 [150 Cal. Rptr. 615] (1978).

Comerica has not alleged sufficient minimum contacts to impose personal jurisdiction over the Petitioners in California. It is not reasonable for California to exercise personal jurisdiction over a foreign national and foreign corporation that have purposefully structured their transactions to avoid the jurisdiction of the forum state based solely upon allegations of imputed conduct, especially when it was within Comerica's power to require Petitioners to agree to submit to jurisdiction in California or guarantee the loans at issue, but it failed to do so.

C. Even if the Court Concludes that Comerica has Established Minimum Contacts over Petitioners, it Would be Unreasonable for California to Exercise Jurisdiction over the Petitioners

This Court has bifurcated the Due Process determination into two inquiries, requiring, first, that the defendant have the requisite contacts with the forum state to render it subject to the forum's jurisdiction, and second, that the assertion of jurisdiction be reasonable. See, *Asahi Metal*, 480 U.S. 102 at 113.

So, even assuming Comerica met its burden of showing Petitioners' minimum contacts with California, it must be determined whether subjecting Petitioners to suit in California would be reasonable and not offend traditional notions of fair play and substantial justice.

From this Court's opinions in *Burger King*, 471 U.S. at 477 and *Asahi Metal*, 480 U.S. 102 at 113, the Circuits have developed various lists of nonexclusive factors to be

balanced in determining reasonableness in a specific jurisdiction context.

The Ninth Circuit considers (1) the extent of the defendant's "purposeful interjection" into the forum state's affairs, (2) the burden on the defendant, (3) the extent of conflict with the sovereignty of the defendant's state, (4) the forum state's interest in adjudicating the dispute, (5) the most efficient judicial resolution of the controversy, (6) the importance of the forum to plaintiff's interest in convenient and effective relief, and (7) the existence of an alternate forum. *Core-Vent*, 11 F.3d at 1487; see also, *Benton v. Cameco Corp.*, 375 F.3d 1070, 1078-80 (10th Cir. 2004) ("[T]he reasonableness prong of the due process inquiry evokes a sliding scale: the weaker the plaintiff's [minimum contacts], the less a defendant need show in terms of unreasonableness to defeat jurisdiction," and finding the exercise of jurisdiction unreasonable: action impacted Canadian sovereignty as it involved a Canadian corporation with no offices or agents in Colorado, Canadian law would govern the dispute, the documents and witnesses were located primarily in Canada, and litigating in Canada would cause no undue hardship on plaintiff).

1. The Extent of the Defendant's "Purposeful Interjection" into the Forum State's Affairs

As noted, the weaker the plaintiff's minimum contacts with the forum state, the less a defendant need show in terms of unreasonableness to defeat jurisdiction.

Here, a foreign national and foreign corporation have purposefully structured their transactions with Comerica to do business in Canada not the jurisdiction of the forum

of California. The contractual arrangements, or lack thereof, between these international parties concerning issues of personal jurisdiction should be respected absent a compelling reason to disregard them. Here, California purports to exercise personal jurisdiction based solely upon allegations of imputed conduct, but imputed conduct is a connection too tenuous to warrant the exercise of personal jurisdiction, especially when it was within Comerica's power to require Petitioners to agree to submit to jurisdiction in California or guarantee the loans at issue, but it failed to do so. This factor weighs heavily in Petitioners' favor.

2. The Burden on the Defendant

Where, as here, Petitioners are from a foreign nation rather than another state, the sovereignty barrier is high and undermines the reasonableness of personal jurisdiction. *Pacific Atl. Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1330 (9th Cir. 1985). This Court has long recognized the unique and substantial burdens placed upon foreign nationals defending themselves in a foreign country. *Asahi Metal Indus.*, 480 U.S. at 114-115. As recognized in *Rocke v. Canadian Auto. Sport Club*, 660 F.2d 395, 399 (9th Cir. 1981), "[although] modern transportation had indeed reduced some of the burden of litigation in a faraway forum," the Canadian defendant organizations "nonetheless face a significantly greater burden defending [an] action in California than in [Canada]," particularly where the alleged acts giving rise to the claim occurred in Canada and most of the discovery would be centered in Canada. The same considerations apply here.

3. The Extent of Conflict with the Sovereignty of the Defendant's State

Here, potential conflicts with Canadian sovereignty are particularly severe because the adjudication of Comerica's alter ego and conspiracy claims will require an analysis and application of Canada's corporation laws in a California court. Moreover, Comerica's contacts with Canada are far more substantial than any contacts Petitioners may have with California. Comerica is a Michigan bank with a chartered subsidiary bank in Canada which is subject to Canadian regulatory banking laws. It has Canadian headquarters in Toronto, and has purposefully injected itself into the international film production and financing industry based in Toronto, an industry in which the Canadian government has a substantial interest. The transactions here involve films produced in Canada and the UK that were slated for international distribution. The allegations of fraud at issue against Petitioners, if they occurred at all, occurred in Canada and involve foreign nationals and foreign distribution rights in the UK, Italy, France, Germany, Greece, Mexico, Brazil and other foreign countries.

4. The Forum State's Interest in Adjudicating the Dispute

Nothing prevents Comerica from moving forward in California pursuant to the jurisdiction and venue clauses set forth in the agreements between Comerica and the Contracting Parties. Comerica is free to assert any and all rights and remedies Comerica provided for itself in the loan documents and security agreements.

At issue here is whether California has a special interest in protecting a Michigan bank in piercing the corporate veil of a Canadian corporation. It has been held that "California has no special interest in regulating banks that are not chartered under California law." *Paccar Int'l, Inc. v. Commercial Bank of Kuwait, S.A.K.*, 757 F.2d 1058, 1065 (9th Cir. 1985). On the other hand, Canada has a strong interest in adjudicating its own laws in actions involving Canadian corporations.

5. The Most Efficient Judicial Resolution of the Controversy

The forum that can most efficiently resolve these controversies is in Ontario, Canada. The vast majority of the parties are non-California parties with all but two of the tangential Defendants either domiciled or residing in Canada. All of Petitioners' documents relevant to Comerica's allegations of fraud are within the jurisdiction of Ontario, Canada, and it would be burdensome and inconvenient for the majority of the witnesses to attend a trial in California because of the expense of travel away from their business and other pursuits. Petitioners presented evidence in the Superior Court that it would not be possible to subpoena (at least twenty (20)) third party witnesses based in Canada for trial in California; while they are subject to process in Ontario. See, App. at pp. 108-113: Howsam Declaration.

Comerica, on the other hand, has a Canadian subsidiary bank headquartered in Toronto that is deeply involved and intimately knowledgeable of the Canadian film industry which is the subject of this litigation.

6. The Importance of the Forum to Plaintiff's Interest in Convenient and Effective Relief, and the Existence of an Alternate Forum

As noted, Ontario Canada is an acceptable alternative forum and given the presence of Comerica's subsidiary bank in Toronto, Comerica will not suffer any genuine harm or even any great inconvenience by adjudicating this case in Ontario. To the extent that Canadian law should apply to Comerica's alter ego and piercing the corporate veil claims, it would be in all the parties' best interests to adjudicate the claims in an Ontario court that is familiar with the Canadian corporation laws governing this case.

CONCLUSION

Weighing all the factors, California's assertion of personal jurisdiction over Petitioners is neither fair nor reasonable and would not comport with the requirements of the Due Process clause of the federal Constitution. Petitioners do not maintain an ongoing or continuous relationship with California and have not purposefully injected themselves into the forum state's affairs. To the contrary, Petitioners have structured their transactions with Comerica to do business in Canada, not the jurisdiction of California. Petitioners are not parties to any agreements with Comerica, they are not personal guarantors of the loans, and they never consented to being subject to jurisdiction in California.

Personal jurisdiction should not be exercised based solely upon theories of imputed conduct such as alter ego and conspiracy against foreigners who purposefully

structured their contractual arrangements with the plaintiff to avoid being haled into court in California. Comerica could have easily provided for jurisdiction over the Petitioners in the lengthy and extensive loan documents, security agreements, interparty agreements and other documents that were executed as a condition for making the loans. The fact that Comerica, a bank with sophisticated legal representation, did not so provide, makes it patently unreasonable to hale Petitioners into California based solely on allegations of imputed conduct. The Petitioners respectfully request that their petition for certiorari be granted.

Respectfully submitted,

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APPENDIX

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App. 1

Court of Appeal, Second Appellate District,
Division Five – No. B180285

S133354

IN THE SUPREME COURT OF CALIFORNIA

En Banc

GREENLIGHT FILM & TELEVISION INCORPORATED et. al., Petitioners,

v.

LOS ANGELES COUNTY SUPERIOR COURT, Respondent;

COMERICA BANK, Real Party in Interest.

(Filed Jul 13, 2005)

Petition for Review DENIED.

George, C.J., was absent and did not participate.

/s/ Werdegar
Acting Chief Justice

App. 2

Court of Appeal, Second Appellate District,
Division Five – No. B180285

S133354

IN THE SUPREME COURT OF CALIFORNIA

GREENLIGHT FILM & TELEVISION INCORPORATED
et. al., Petitioners,

v.

LOS ANGELES COUNTY SUPERIOR COURT, Respondent;

COMERICA BANK, Real Party in Interest.

(Filed Jun 16, 2005)

The time for granting or denying review in the above-entitled matter is hereby extended to and including July 22, 2005, or the date upon which review is either granted or denied.

/s/ George
Chief Justice

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

GREENLIGHT FILM & TELEVISION, INC., et al., Petitioners, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent. COMERICA BANK, Real Party in Interest.	B180285 (Super. Ct. No. BC316406) (Andria K. Richey, Judge) **ORDER** **(Filed Apr. 14, 2005)**

THE COURT:

The court has read and considered the petition for writ of mandate, filed January 6, 2005. The petition is denied.

/s/ Turner
TURNER, P.J.

/s/ Armstrong
ARMSTRONG, J.

/s/ Mosk
MOSK, J.

Charles M. Coate
Law Offices of Charles M. Coate, APC
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Case Number B180285
Division 5
Greenlight Film and Television, Inc.;
Gary Howsam
v.
S.C.L.A.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 12/15/04	DEPT. 31
HONORABLE ANDRIA K. RICHEY JUDGE	S. WONG DEPUTY CLERK
HONORABLE #3 JUDGE PRO TEM	ELECTRONIC RECORDING MONITOR
V. SOLIS, CA DEPUTY SHERIFF	I. LAFRANCHI CSR#9120 REPORTER

8:30 am	BC316406	Plaintiff Counsel	
	COMERICA BANK VS GARY HOWSAM ET AL		SEE BELOW
		Defendant Counsel	
	170.6 MARY ANN MURPHY		

NATURE OF PROCEEDINGS:

MOTION OF DEFENDANTS, GFT CIRCLE FILMS, INC., ROAD RAGE FILMS, INC., JANUS PRODUCTIONS, INC., GFT GOING BACK FILMS, INC., GFT HERESY FILMS, INC., GFT/REDWOOD KOTN FILMS, INC., GFT/REDWOOD INGNITION FILMS, INC., TO COMPEL ARBITRATION IN LIEU OF ANSWER AND MOTION TO STAY PROCEEDINGS;

MOTION OF DEFENDANTS, GREENLIGHT FILM AND TELEVISION INC., AND GARY HOWSAM, TO DISMISS OR STAY ACTION;
(C/F 11-17-04)

MOTION OF ABOVE NAMED DEFENDANTS, TO QUASH SERVICE OF SUMMONS FOR LACK OF PERSONAL JURISDICTION;
(C/F 11-17-04)

MOTION OF DEFENDANTS, GFT ENTERTAINMENT INC., TO QUASH SERVICE OF SUMMONS FOR LACK OF PERSONAL JURISDICTION;
(C/F 11/17/04)

CASE MANAGEMENT CONFERENCE;
(C/F 12-02-04)

PLAINTIFF	DEFENDANT
RONALD K SITTLER (X)	JAMES M KILKOWSKI (X)
ROBERT S ADDISON JR (X)	ADAM L STRELTZER (X)
MICHAEL L WACHTEL (X)	CHARLES M COATE (X)
	A RAYMOND HAMRICK III (X)
	JAMES R ZATOLOKIN (X)

MINUTES ENTERED
12/15/04
COUNTY CLERK

Matters are called for hearing argued and taken under submission.

Later, the Court rules as follows:

The motion of Greenlight/Howsam to quash for lack of personal jurisdiction is denied. The Court finds sufficient contacts to exercise at least

"specific jurisdiction" over these defendants. The motion of Greenlight/Howsam to stay/dismiss on the grounds of forum non conveniens is denied. The Court finds that California is the more convenient forum and that California has a strong interest in providing a forum for its corporate citizens (which plaintiff was at the time of these events) in which to try cases of this sort. In addition, the moving parties did not specify which other forum would be able to try this case, or indicate that all other parties would be subject to or would submit to jurisdiction in any specific forum. Canada is not one forum, but is made up of numerous provinces which may not all afford the same rights and remedies. But that issue was not addressed by moving parties.

These parties requested that the Court, if it denied their motion to quash, grant them some additional time per CCP Section 418.10(c) within which to seek relief; the Court hereby grants them 20 days from service of this order within which to file a petition for review.

The motion of GFT Entertainment to quash for lack of personal jurisdiction shall be continued so the discovery on jurisdictional issues may be conducted. The Court shall continue the motion to April 19, 2005 at 8:30. A supplemental opposition to the motion shall be filed on or before April 5, 2005, and shall be personally served on all parties. A supplemental reply shall be filed on or before April 13, 2005 and shall be personally served. Any evidentiary objections to any reply declarations must be filed and personally served on or before April 15, 2005.

As to the motion to compel arbitration, the parties to that motion are to file supplemental briefs

on the issues addressed in the Court's tentative provided at the hearing. Those briefs must be filed and personally served on December 27, 2005 and copies thereof delivered to the Courtroom by noon on that day. That motion will then be submitted.

The Court rules as follows as to evidentiary objections filed by various defendants to the following declarations, to the extent these objections relate to the motions which are ruled upon herein:

Objections to Carpenter: Overruled as to paragraphs 2, 5, 10, 14-19; overruled as to paragraph 4, except as to the statement of Rector, as to which objection is sustained; overruled as to paragraph 9, except as to the statement "Howsam-controlled entities", as to which it is sustained; overruled as to paragraph 8, except for the introductory statement as to control, as to which it is sustained; otherwise sustained.

Objections to Gross: Overruled

Objections to Addison: Overruled as to paragraphs 2-4, 9-17, exhibits N and O; otherwise sustained.

As to objections of Plaintiff to Sacks declaration, they are sustained for lack of foundation and speculation. The Case Management Conference is continued to January 20, 2005 at 8:30 a.m. in Department 31. Parties are to meet and confer prior to that date on arbitration of this entire dispute, and if no agreement is reached then to select mediator, discovery referee and consider whether accounting reference is needed.

Clerk to give notice.

CLERK'S CERTIFICATE OF MAILING/ NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 12-15-04 upon each party or counsel named below by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.

Date: December 15, 2004

John A. Clarke, Executive Officer/Clerk

By: /s/ S. Wong
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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

Specially appearing Defendants GREENLIGHT FILM & TELEVISION, INC., an Ontario, Canada, corporation, and GARY HOWSAM, a Canadian national, Petitioners, vs. SUPERIOR COURT OF THE COUNTY OF LOS ANGELES, Respondent.	Case No. S133354 [Appellate No. B180285; Superior Court No. BC316406]
COMERICA BANK, a Michigan corporation, Real Part In Interest.	

PETITION FOR REVIEW

After a decision by the Court of Appeal
Second District, Division Five

(Filed Apr. 25, 2005)

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Attorneys for Petitioners and Specially Appearing Defendants, Greenlight Film & Television Inc., an Ontario Canada Corporation and Gary Howsam, a Canadian national

ISSUE PRESENTED FOR REVIEW

Can personal jurisdiction be exercised over a citizen of a foreign country based solely upon an allegation – unsupported by admissible proof – that the defendant is the alter ego of, or engaged in a conspiracy to defraud with, another defendant – as the Second District Court of Appeal held in this case or does the law require the plaintiff to establish proof of these matters by a preponderance of admissible evidence – as the First and Fifth District Courts of Appeal, with respect to alter ego, and the First and Fourth District Courts of Appeal, with respect to conspiracy, have held in other cases?

WHY REVIEW SHOULD BE GRANTED

In *Sheard v. Superior Court* (1974) 40 Cal.App.3d 207, the First District Court of Appeal held that in the absence of admissible evidence and based solely upon alter ego allegations, personal jurisdiction cannot be exercised over a non-resident defendant. In *Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, the Fifth District Court of Appeal reached the same conclusion. In *Mansour v. Superior* Court (1995) 38 Cal.App.4th 1750, the Fourth District Court of Appeal held that personal jurisdiction could not be exercised over a non-resident defendant in the absence of admissible evidence and based solely upon allegations of conspiracy. The First District Court of Appeal reached the same result in *Crea v. Court of Appeal* (1996) 48 Cal.App.4th 509.

Here, the Second District Court of Appeal reached the contrary result. Its decision is thus in conflict with those of the First, Fourth and Fifth District Courts of Appeal. Specifically, the Second District Court of Appeal denied

review of the trial court's order denying a motion to quash service based upon a lack of personal jurisdiction where there was no admissible evidence that the defendants were the alter ego of, or had conspired with, the alleged primary tortfeasors.

Accordingly, review should be granted under California Rule of Court 28(b) in this case to secure uniformity of decision by resolving this implicit conflict amongst Districts of the Court of Appeal. A uniform rule is necessary to avoid the unacceptable circumstance where personal jurisdiction may be exercised over a foreign defendant in one part of the State while personal jurisdiction will be denied over a foreign defendant under the same or similar facts in another part of the State.

INTRODUCTION

A. Background

In this case, Plaintiff and Real Party In Interest Comerica Bank ("Comerica"), a Michigan corporation, seeks to recover repayment of certain loans it made to several of the defendants in the underlying action as part of the financing for the production of seven feature films (the "Films"). The Films were produced in Canada or co-produced in Canada and the United Kingdom by Canadian and/or United Kingdom corporations and were to be distributed in foreign countries.

Neither of Petitioners, Gary Howsam ("Howsam"), a Canadian citizen, nor Greenlight Film & Television, Inc. ("GFTI"), an Ontario, Canada corporation, were parties to the loan agreements. It is thus undisputed that no contractual privity exists between Howsam and GFTI, on the

one hand, and Comerica, on the other hand. Rather, Comerica has named Howsam and GFTI as defendants based solely upon an alter ego theory or having conspired with the borrower-defendants to defraud Comerica in connection with the loans.

Howsam and GFTI specially appeared and moved to quash service of the First Amended Complaint on them, asserting a lack of personal jurisdiction under C.C.P. § 418.10(c). Comerica proffered no competent admissible evidence of the alter ego allegations or that either defendant had conspired with the borrower-defendants. Indeed, the trial court sustained the objections of Howsam and GFTI to Comerica's purported evidence of forgery and fraud.

Despite Comerica's failure to meet its required evidentiary burden, the trial court determined that specific jurisdiction existed over petitioners Howsam and GFTI. They timely sought a writ of mandate, but the Second District Court of Appeal denied it on April 14, 2005, a copy of the order of which is attached hereto. This denial of relief conflicts with the decisions of the First and Fifth Circuits and this Court in similar circumstances. Accordingly, relief should be granted in this Court to create uniformity of decision.

B. Howsam and GFTI Have No "Contacts" With California

Howsam and GFTI are named as two of the defendants in the underlying action by Comerica, styled as *Comerica Bank v. Gary Howsam, et al.*, Los Angeles County Superior Court case no. BC 316406. Howsam lives

in Toronto, Canada, and is the President of GFTI. (Petitioner's Exhibits ("PE"), Vol. I, Ex. 1, pp. 1-1-3.)[1]

GFTI is an Ontario, Canada corporation that maintains its principal place of business in Toronto, Ontario. (PE, Vol. I, Ex. 1, p. 2.) GFTI is not now or has never been qualified to do business in the State of California. (*Id.*)

None of GFTI's officers or directors, including Howsam, reside or are domiciled in the State of California. (PE, Vol. I, Ex. 1, p. 2.) GFTI has no employees residing or domiciled in California. (*Id.*) GFTI has no branch office or comparable facilities in California, and has no telephone listings or mailing addresses in California. (*Id.*) No meetings of GFTI's board of directors or shareholders have been held in California and none of its officers or directors has attended business conferences in such capacities within the State of California. (*Id.*)

Neither GFTI nor Howsam maintain any bank accounts or other tangible personal or real property in the State of California. (PE, Vol. I, Ex. 1, p. 2.) GFTI does not direct any of its advertising specifically toward California residents nor does it advertise in publications that are directed primarily toward California residents. (*Id.*)

At no time has Howsam individually or GFTI ever entered into a written agreement with Comerica. (PE, Vol. I, Ex. 1, p. 2.) At no time did Howsam ever meet with Comerica's transactional attorney, G. Raymond F. Gross, in his personal capacity, rather, at all times, Howsam was

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[1] References to "Petitioners' Exhibits" are to those filed with the Court of Appeal in this matter.

acting in the course and scope of his duties on behalf of a foreign corporate entity. (*Id.*, at Vol. 5, Ex. 24, p. 5.)

At no time has Howsam ever forged the name of any foreign distributor on a distribution agreement or a notice of assignment or copied or pasted the name of any foreign distributor on a distribution agreement or a notice of assignment. (PE, Vol. 5, Ex. 24, p. 2.) In contrast, Howsam categorically denied that any such conduct occurred. (*Id.*, at Vol. 5, Ex. 24, p. 5.)

Moreover, neither Howsam nor GFTI is a signatory to any of the loan agreements, distribution agreements or notices of assignments at issue in this case; Howsam has never personally sought financing from the real party in interest, rather Howsam has always acted on behalf of corporate entities in connection with the production of motion pictures; and Howsam is not a party to any personal guarantees in favor of the real party in interest in connection with the disputed motion pictures in this action. (PE, Vol. 5, Ex. 24, p. 2.) Howsam also did not submit any of the subject license agreements to Comerica. (*Id.*, at Vol. 5, Ex. 24, p. 3.)

C. The Court of Appeal Erred When It Refused to Quash Service

On October 27, 2004, Howsam and GFTI specially appeared in the underlying action and moved to quash service of summons, and to stay or dismiss this action against them on grounds of forum non conveniens. (PE, Vol. I, Exs. 1-5.) On December 15, the trial court heard the motion to quash filed by Howsam and GFTI and took it under submission. (*Id.* at Vol. V, Ex. 29.) Later that day, the trial court issued its order.

Notably, the trial court sustained the objections of Howsam and GFTI to Comerica's purported evidence of forgery and fraud. (*Id.*, e.g., at Vol. V, Ex. 30, pp. 3-4 (objections sustained to Exh. N and O to Addison Decl).) Nevertheless, the trial court denied their motion to quash, finding that at least "specific" jurisdiction over defendants existed in this case and that California was the most convenient forum. (*Id.* at Vol. V, Ex. 30 at p. 2 of 6.)

Howsam and GFTI timely filed a Petition For Writ of Mandate, Prohibition or Other Appropriate Relief with the Second District Court of Appeal from the denial of their motion to quash on January 6, 2005. The Court of Appeal denied the requested relief on April 14, 2005 in a two-line Order, a copy of which is attached hereto as required.

REVIEW SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE HOLDING BELOW AND THOSE IN OTHER DISTRICTS AND THIS COURT CONCERNING THE APPLICABLE STANDARD OF PROOF FOR PERSONAL JURISDICTION OVER NON-RESIDENTS FOR CLAIMS BASED ON ALTER EGO AND CONSPIRACY

Where as here, personal jurisdiction "is challenged by a non-resident [in this case foreign] defendant, the burden of proof is upon the plaintiff to demonstrate that 'minimum contacts' exist between defendant and the forum state to justify imposition of personal jurisdiction." (*Sheard v. Superior Court, supra,* 70 Cal. App. 3d. at 430.) The plaintiff must demonstrate "by a preponderance of the evidence that all necessary jurisdictional criteria are met. The jurisdictional facts must be proved by competent, admissible evidence. (*Evangelize China Fellowship, Inc. v.*

Evangelize China Fellowship, Inc. (1983) 146 Cal. App. 3d 440, 444.)

Hearsay is not competent proof (*Floveyor International, Ltd. v. Superior Court* (1997) 59 Cal. App. 4th 789, 796 (declaration by plaintiff's attorney stating "discovery in this case revealed . . . "was "nothing more than inadmissible hearsay.").) Similarly, an unverified complaint is insufficient proof. (*Ziller Elec. Lab. GmbH v. Superior Court* (1985) 206 Cal. App. 3d 1222, 1232-33; *Mihlon v. Superior Court* (1985) 165 Cal. App. 3d 703, 710.)

A. The Decision On the Alter Ego Claim Conflicts With Two Prior Decisions In California

The decision below, stands for the proposition that personal jurisdiction *can* be exercised over a non-resident and foreign defendant based solely upon an *allegation* of alter ego liability, squarely conflicts with prior decisions in California, namely, *Sheard v. Superior Court, supra,* 40 Cal.App.3d 207, and *Sonora Diamond Corp. v. Superior Court, supra,* 83 Cal.App.4th 523. This conflict requires review by this Court to "secure uniformity of decision." (*Peralta Community College District v. Fair Employment & Housing Commission* (1990) 52 Cal.3d 40, 44.)

1. In *Sheard*, the First District Court of Appeal Required Admissible Evidence of Proof of An Alter Ego Relation to Exercise Personal Jurisdiction

In *Sheard v. Superior Court, supra,* 40 Cal.App.3d 207, the plaintiff filed an action against a Wisconsin corporation and some of its stockholders for personal injuries caused in California. The plaintiff included the

stockholders as defendants under a theory of alter ego liability.

The stockholder defendants then moved to quash service of the summons and complaint for lack of personal jurisdiction. Their motion was supported by affidavits that established a lack of contacts with California. In opposition, the plaintiff filed a declaration that proffered facts showing that he could allege alter ego claims, but lacked proof of the actual existence of the alter ego relationship. (*Sheard, supra,* 40 Cal.App.3d at 211.)

The trial court denied the motion. On appeal, however, the First District Court of Appeal reversed, holding that there was no admissible evidence that established the existence of an alter ego relationship. Accordingly, the court could not exercise personal jurisdiction over the defendant. (*Id.* at 211-213.)

2. In *Sonora*, the Fifth District Court of Appeal Reached the Same Result

An identical result was reached by the Fifth District Court of Appeal in *Sonora Diamond Corp. v. Superior Court, supra,* 83 Cal.App.4th 523. There, the plaintiff sued Sonora Mining Corp. and its parent company, Sonora Diamond Corp., for breach of contract. Sonora Diamond had no contacts with California and jurisdiction was based upon an allegation that it was the alter ego of Sonora Mining Corp.

Sonora Diamond filed a motion to quash. The trial court denied the motion, but the Fifth District Court of Appeal reversed, explaining in pertinent part:

> In California, two conditions must be met before the alter ego doctrine will be invoked. First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone . . . [¶] Here, at least one of the two essential elements of the alter ego doctrine was not established; there was no evidence of any wrongdoing by either Diamond or Sonora Mining or any evidence of injustice flowing from the recognition of Sonora Mining's separate corporate identity. Without such evidence, the alter ego doctrine cannot be invoked . . .
>
> * * *
>
> The [plaintiff] is plainly wrong to the extent it claims the inclusion in a complaint of alter ego allegations automatically gives the trial court jurisdiction over the defendant against whom such allegations are directed. It is correct that a motion to quash for lack of personal jurisdiction does not implicate the merits of the complaint, but the plaintiff, in opposing the defendant's motion to quash, must present evidence to justify a finding that the requisite jurisdictional minimum contacts.

(*Sonora Diamond Corp. v. Superior Court, supra,* 83 Cal.App.4th at 528-540 [internal citations omitted].)

3. The Conflict Between the Holdings in *Sheard* and *Sonora* and the Decision Below Cannot Be Reconciled Without Review By This Court

Here, there was no admissible evidence proffered by Comerica in opposition to the motion to quash by Howsam and GFTI that established the elements of the alter ego doctrine. Indeed, there was absolutely nothing inequitable or untoward about the forming of the subject production company entities.

The competent evidence submitted by indicated the following corporate formalities: lack of ownership by Howsam in the subject production company defendants, and segregated finances by defendants and adherence to corporate records. There was an utter failure by Comerica to prove by a preponderance of admissible evidence that these Canadian petitioners, who have no contractual privity Comerica, are alter egos of their co-defendants herein for purposes of establishing jurisdiction over them.

Nevertheless, the trial court denied the motion to quash by Howsam and GFTI. The Second District Court of Appeal then denied their petition for writ of mandate, implicitly disagreeing with the holdings in *Sheard* and *Sonora*. Accordingly, this Court must grant review to create uniformity in the standards of proof throughout California sufficient for the exercise of personal jurisdiction over a non-resident defendant.

B. The Decision On the Conspiracy Theory Also Conflicts With the Rule in the First and Fourth Districts

The decision below also implicitly holds that personal jurisdiction *can* be exercised over a non-resident defendant based solely upon an *allegation* of conspiracy. This decision also directly conflicts with prior decisions in California, namely, *Mansour v. Superior Court, supra,* 38 Cal.App.4th 1750, and *Crea v. Court of Appeal, supra,* 48 Cal.App.4th 509. This conflict also requires review by this Court to "secure uniformity of decision." (*Peralta Community College District v. Fair Employment & Housing Commission, supra,* 52 Cal.3d at 44.)

In *Mansour v. Superior Court, supra,* the Fourth District Court of Appeal held that personal jurisdiction cannot be exercised over a non-resident conspirator without admissible proof of the conspiracy that satisfies the preponderance of the evidence standard. (*Id.*, 38 Cal. App. 3d at 1760.) The First District Court of Appeal reached the same result in *Crea v. Court of Appeal, supra,* 48 Cal.App.4th at 516-517.

Comerica's claims against Howsam and GFTI in the underlying action are based upon a purported conspiracy to create false license agreements and assignments to defraud Comerica. (*See* PE, Vol. I, Ex. A, ¶¶ 23, 113-116.) Comerica, however, proffered no admissible evidence on this score. Indeed, the trial court sustained the objections of Howsam and GFTI to the purported evidence of the fraud. (PE, Vol. V, Ex. 30, pp. 3-4.)

Nevertheless, the trial court denied Petitioners' motion to quash. The Second District Court of Appeal denied their petition to reverse that decision, implicitly approving a rule that conflicts with the holdings of the

First and Fourth Districts. Review is required to secure uniformity of these decisions.

CONCLUSION

For the reasons set forth herein, specially appearing Petitioners Howsam and GFTI respectfully request this Court to grant review of the issues raised herein.

Dated: April 24, 2005

COSTA, ABRAMS & COATE, LLP

By: /s/ Charles M. Coate
CHARLES M. COATE
Attorneys For Petitioners
GREENLIGHT FILM & TELEVISION, INC. and GARY HOWSAM

CERTIFICATE OF WORD COUNT

The text of this petition consists of 3,477 and the text of the table of contents and authorities consists of 310 words as counted by the Microsoft Word version 2000 word-processing program used to generate this petition.

DATED: April 24, 2005

COSTA, ABRAMS & COATE, LLP

By: /s/ Charles M. Coate
CHARLES M. COATE
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PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1221 Second Street, Third Floor, Santa Monica, California 90401.

On April 24, 2005, I served the foregoing document described as PETITION FOR REVIEW on the interested parties in this action by placing a copy thereof enclosed in a sealed envelope as follows:

[X] (**BY MAIL**) I deposited such envelope in the mail at Santa Monica, California. The envelope was mailed with postage fully prepaid. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on the same day with postage thereon fully prepaid at Santa Monica, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

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[x] (**BY PERSONAL SERVICE/MESSENGER**) I caused such envelope to be delivered by hand by messenger Service to the addressee(s) in open court on April 25, 2005.

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[ ] (**BY TELEFAX**) I caused such document to be transmitted via telefax to the offices of the addressee(s), telefax number:

[ ] (**BY FEDERAL EXPRESS**) I delivered such envelope on the interested party below by placing a true copy thereof in a sealed Federal Express envelope and by placing said envelope for overnight delivery in a box or other facility regularly maintained by Federal Express to receive documents, with said envelope.

[X] (**STATE**) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on April 24, 2005, at Santa Monica, California.

/s/ Charles M. Coate
Charles M. Coate

Appellate Case No. ___

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ___

Specially, appearing Defendants Greenlight Film & Television Inc., an Ontario, Canada corporation and Gary Howsam, a Canadian national

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent.

PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES; SUPPORTING EXHIBITS

APPEAL FROM THE SUPERIOR COURT
OF LOS ANGELES
THE HONORABLE ANDRIA K. RICHEY,
L.A.S.C. BC 316406

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INTRODUCTION.

This case presents a Michigan corporation attempting to hail a Canadian corporation and a Canadian national into California without any competent admissible evidence, let alone a preponderance of the evidence, that either has committed a tort in California or is the alter ego

of an entity that this Court has jurisdiction over. It is undisputed that no contractual privity exists between the real party in interest and petitioners herein. Despite the failure by the real party in interest to meet the burden incumbent upon it, the respondent court has determined that the exercise of specific jurisdiction over petitioners exists under these facts and that California is the more convenient forum in which to try this case, although ten of the thirteen parties are foreign and eleven out of thirteen are non California parties, including the plaintiff. Therefore, petitioners seek a writ of mandate pursuant to C.C.P. Sec. 418.10(c) to require the respondent court to enter its order quashing the service of summons or staying or dismissing the action or alternatively, request that a writ of prohibition issue to prevent further proceedings following this improper denial of petitioner's motion to quash.

At the crux of this dispute is a slate of foreign films physically produced in Canada or co-produced in Canada and the United Kingdom by Canadian and/or United Kingdom corporations and nationals. It is undisputed that no contractual privity exists between the Michigan real party in interest and petitioners herein. Indeed, California has very little interest in the production of these foreign film. Moreover, it is admitted that the real party in interest provided but a portion of the funding for this slate of foreign films to Canadian corporations in Canada; none of which are petitioners herein. Yet, real party in interest alleges that it was defrauded into funding a portion of the slate of foreign films in Canada and/or the United Kingdom and that petitioners are the "alter egos" of the Canadian corporations that produced the films at issue.

It is noted that the real party in interest was never a California corporation at the time of the alleged events as

opined by the respondent court. Moreover, no competent admissible evidence offered by the real party in interest in any way controverts the evidence submitted by petitioners that petitioners never engaged in any fraudulent conduct or forgery. Simply, what is presented is the mere theory, as opposed to any admissible evidence, of a conspiracy to defraud, which will not support the exercise of jurisdiction over a foreign defendant under California law. Nor, does the rote inclusion of alter ego allegations automatically give California jurisdiction over foreign defendants against whom such allegations are directed. Indeed, real party in interest fails to provide any competent and admissible evidence to support its wild "alter ego" theory. Nor, is there anything wrong with creating a single purpose entity in another country by nationals of that foreign country to produce a motion picture. Rather, as the real party in interest is well aware, that is standard operating procedure, and how motion pictures are commonly produced. Indeed, each Canadian corporation which accepted real party in interest's partial funding in Canada was admittedly created at the behest of and in accordance with the real party in interest's very own lending requirements.

Not surprisingly, the vast majority of relevant witnesses and documents concerning the financing and production of these foreign film productions are in Canada, not California. Clearly, Canada is a suitable alternative forum to resolve the real party in interest's claims against petitioners herein who did not enter into the written agreements at issue in this litigation. Nor, does real party in interest offer any evidence that its claims could not be heard and resolved in Canadian courts against these defendants. Accordingly, Defendants respectfully submit that a writ of mandate pursuant to C.C.P. Sec.

418.10(c) issue in this case to require the respondent court to enter its order quashing the service of summons or staying or dismissing the action. Alternatively, petitioners request that a writ of prohibition issue to prevent further proceedings following this improper denial of petitioner's motion to quash or staying or dismissing the action.

PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF.

Authenticity of Exhibits.

1. All exhibits accompanying this petition are true copies of original documents on file with respondent court. The exhibits are incorporated herein by reference as though fully set forth herein. The exhibits are numbered consecutively from 1 through 30, with specific page references throughout each such exhibit.

Beneficial Interest of Petitioners; Capacities of Respondent and Real Parties In Interest.

2. Petitioners and Specially appearing Defendants Greenlight Film & Television Inc., an Ontario, Canada corporation and Gary Howsam, a Canadian national are named defendants in an action now pending in respondent superior court entitled *Comerica Bank, a Michigan Banking corporation v. Gary Howsam, an individual, et. al.*, L.A.S.C. Case No. BC 316406. Plaintiff is named herein as the real party in interest.

Summary of Relevant Facts.

3. Specially appearing Defendant Gary Howsam is an individual over 18 years of age and a citizen of the

Province of Ontario, Canada residing in Toronto, Canada. Mr. Howsam is also the President of Greenlight Film & Television, Inc. ("GFTI") which is a corporation existing under the laws of Ontario, Canada which maintains its principal place of business at 124 Merton Street, Suite 407, Toronto, Ontario M4S 2Z2. (Petitioner's Exhibits Vol. I, Ex. 1, p. 2)

4. GFTI is not now or has never been qualified to do business in the State of California. (Petitioner's Exhibits Vol. I, Ex. 1, p. 2)

5. None of GFTI's officers or directors, including Howsam, reside or are domiciled in the State of California. (Petitioner's Exhibits Vol. I, Ex. 1, p. 2)

6. GFTI has no employees, residing or domiciled in California. (Petitioner's Exhibits Vol. I, Ex. 1, p. 2)

7. GFTI has no branch office or comparable facilities in California, and has no telephone listings or mailing addresses in California. (Petitioner's Exhibits Vol. I, Ex. 1, p. 2)

8. Neither GFTI nor Howsam maintain any bank accounts or other tangible personal or real property in the State of California. (Petitioner's Exhibits Vol. I, Ex. 1, p. 2)

9. GFTI does not direct any of its advertising specifically toward California residents nor does it advertise in publications that are directed primarily toward California residents. (Petitioner's Exhibits Vol. I, Ex. 1, p. 2)

10. No meetings of GFTI's board of directors or shareholders have been held in California; none of its officers or directors have attended business conferences in

such capacities within the State of California. (Petitioner's Exhibits Vol. I, Ex. 1, p. 2)

11. At no time has Howsam individually or GFTI ever entered into a written agreement with Plaintiff. Nor has Howsam individually ever entered into a written agreement with the Plaintiff. (Petitioner's Exhibits Vol. I, Ex. 1, p. 2)

12. The following are names and addresses of all person known by Petitioners to be percipient witnesses to any of the matters raised in the pleadings in this action and the matters upon which they are expected to testify:

a. Howsam resides in Toronto, Ontario, Canada and will testify to the matters set forth herein on my own behalf on behalf of GFTI;

b. Greenlight Film and Television Inc. is a Toronto, Ontario, Canada Corporation and it expected to testify to the matters to which it is a percipient witness;

Plaintiff is a Corporation existing under the laws of the State of Michigan. It is unknown what Plaintiff will testify to. (Petitioner's Exhibits Vol. I, Ex. 1, p. 3)

13. Further, the interests of justice and the convenience of the parties and witnesses would be served by transferring this action to Ontario, Canada for the following reasons: (Petitioner's Exhibits Vol. I, Ex. 1, p. 2, 3)

a. It would be burdensome and inconvenient for the majority of the witnesses set forth above to attend a trial in California because of the expense of travel away from their business and other pursuits. (Petitioner's Exhibits Vol. I, Ex. 1, p. 3)

b. It would not be possible to subpoena numerous third party Canadian witnesses for trial in California; while they are subject to process in Ontario, Canada to which transfer is sought. Such witnesses might include among others:

1) David Woodfield – Gowling Strathy and Henderson; knowledge of differentiation of Greenlight Film and Television Inc. and Production Company defendants and absence of alter ego relationship

2) GFT Circle Films Inc., GFT Heresy Films Inc., Road Rage Films Inc., Janus Productions Inc., GFT Going Back Films Inc., Gft/Redwood KOTN Films Inc., Gft/Redwood Ignition Films Inc., and Carolyn Stamegna – legal formation of Production Company defendants

3) Dave Bruner – former head of production services at Medallion PFA

4) Brian White – Technicolor, formerly Medallion PFA

5) Jane Douglas – Production Accoutant, "Global Heresy" and "The Circle"

6) Adeline Elias – production accountant who managed "Going Back" accounts

7) Tracy Boyd – "Road Rage" line producer

8) James Mou – "The Circle" line producer

9) Juliette Hagopian – line producer, "Going Back"

10) Gregor Hutchinson – post production supervisor for "Going Back" and for "Ignition" and for "Kevin of the North" and for "The Circle" and for "Global Heresy"

11) Warren Nimchuk, Price Waterhouse re financing and budget reviews of Production Company Defendants

12) Jim Sternberg, former president of The Completion Guarantors and current president of Film Finance Canada

13) John Ross, former Chairman of The Completion Guarantors. Currently Chairman of Film Finances Canada.

14) Zenon Marchowski, former loan officer and account manager of CIBC

15) Bob Presner, former President of Film Finances Canada

16) Debbie Mermelstein, former counsel to Film Finances Canada

17) David Steinberg, attorney at Heenan Blaikie

18) Claude Forest, Multimedia insurance brokers

19) Mauro Spagnolo, former VP with CIBC.

20) Oliver Groom; post production and delivery supervisor.

14. All of the books and records of GFTI and Howsam are located in Toronto, Ontario, Canada to which transfer is sought. (Petitioners' Exhibits Vol. I, Ex. 1, p. 5)

15. At no time has Gary Howsam ever forged the name of any foreign distributor on a distribution agreement or a notice of assignment. Further, Howsam has never copied or pasted the name of any foreign distributor on a distribution agreement or a notice of assignment. (Petitioners' Exhibits Vol. 5, Ex. 24, p. 2)

16. Neither Mr. Howsam nor Greenlight Film & Television Inc. are signatories to any of the loan agreements, distribution agreements or notices of assignments at issue in this case. Petitioners are simply not parties to the subject disputed contracts. Mr. Howsam has never personally sought financing from the real party in interest; rather Mr. Howsam has always acted on behalf of corporate entities in connection with the production of motion pictures. Nor is Mr. Howsam a party to any personal guarantees in favor of the real party in interest in connection with the disputed motion pictures in this action. (Petitioners' Exhibits Vol. 5, Ex. 24, p. 2)

17. "[A]mong the many documents *required* by Comerica for the loans for each Film, the corporate records detailing the formation of each SPE [single purpose entity] was provided to Comerica by [Mr.] Howsam." (Petitioners' Exhibits Vol. III, Ex. 16, p. 5)

18. It is required practice by Comerica and other lenders in the motion picture industry for a corporate or limited liability entity to be established in order to accept loan proceeds, pay production and distribution expenditures, and convey and sell rights. It also serves the interests of Plaintiff in the event it wishes to exercise its rights to foreclose on its collateral, including any and all rights in and to the disputed motion pictures. (Petitioners' Exhibits Vol. 5, Ex. 24, p. 3)

19. Mr. Howsam never submitted any of the subject license agreements to Plaintiff. (Petitioners' Exhibits Vol. 5, Ex. 24, p. 3)

20. On October 27, 2004 specially appearing defendants moved to quash service of summons and to stay or

dismiss this action against them on grounds of forum non conveniens. (Petitioners' Exhibits Vol. I, Exs. 1-5)

21. A continuance of the healing date and an extension of real party in interest's time to oppose the motions was granted upon its ex parte application and thereafter opposition papers were filed and served pursuant to the extension on December 3, 2004. No additional time to reply was provided for in the Court's order granting the ex parte application. (Petitioners' Exhibits Vol. I, Exs. 6-8; Vol. I Exs. 10-13; Vol. II Exs. 14, 15; Vol. III, Ex. 16, subparts A-I; Vol. IV, Ex. 16 subparts J-Z)

22. At no time did Mr. Howsam ever meet with G. Raymond F. Gross in his personal capacity. At all times, Mr. Howsam was acting in the course and scope of his duties on behalf of a foreign corporate entity. (Petitioners' Exhibits Vol. 5, Ex. 24, p. 5)

23. The declarations of Robert Addison, Carmen Carpenter and G. Raymond F. Gross are devoid of any statement by anyone with personal knowledge that Mr. Howsam ever forged or caused a document to be forged. (Petitioners' Exhibits Vol. I, Ex. 13; Vol. II, Ex. 14, and Vols. III and IV, Ex. 16) Vol. 5, Ex. 24, p. 5)

24. Mr. Howsam categorically denied that any such conduct occurred. (Petitioners' Exhibits Vol. 5, Ex. 24, p. 5)

25. On December 10, 2004 reply papers and evidentiary objections to the evidence submitted in opposition to the motion to quash service of summons and to stay or dismiss this action against specially appearing defendants on grounds of forum non conveniens were filed by specially appearing defendants. The evidentiary objections effectively assert that no admissible evidence of alleged forgery

by specially appearing defendants was offered by the real party in interest; nor, was any admissible evidence of an alter ego relationship between specially appearing defendants and other defendants herein offered. (Petitioners' Exhibits Vol. V, Exs. 17-24)

26. On December 14, 2004 real party in interest filed and served evidentiary objections and responses to evidentiary objections. (Petitioners' Exhibits Vol. V, Exs. 25-28) Later that day the court issued its tentative ruling for the hearing on December 15, 2004 summarily denying the motions.

27. On December 15, 2004 the court's tentative ruling summarily denying the motions was orally argued, and deemed submitted. (Petitioners' Exhibits Vol. V, Ex. 29 is a true and correct copy of the December 15, 2004 Reporter's Transcript) The court later that day issued its order ruling on the evidentiary objections and adopted its tentative ruling denying the motion to quash service of summons and to stay or dismiss this action against specially appearing defendants on grounds of forum non conveniens, finding that at least "specific" jurisdiction over defendants existed in this case and that California was the most convenient forum. (Petitioner's Exhibits Vol. V, Ex. 30 at p. 2 of 6; Petitioners' Exhibits Vol. V, Ex. 30 is a true and correct copy of the December 15, 2004 order denying specially appearing defendants' motion to quash and to stay or dismiss this action on grounds of forum non conveniens)

28. Although twenty days additional leave of court was sought to file the instant writ pursuant to C.C.P. Sec. 418.10(c), given the intervening Christmas and New Years Holidays and the vacation plans of petitioner Howsam and

his counsel, only ten (10) additional days were granted by respondent court, thereby allowing specially appearing defendants twenty (20) days from notice of the Court's Order by mail in which to petition the court's ruling. The order extended the time to file and serve the instant writ to January 10, 2004. (Dec. 15, 2004 + 5 for mail + 20 days leave = January 9, 2005 (Sunday) – Monday, January 10, 2005.

Basis for Relief.

29. The first issue presented in this writ is whether "specific" personal jurisdiction exists over these specially appearing Canadian defendants herein and whether California is an inconvenient forum for this international motion picture financing and distribution dispute under C.C.P. Sec. 418.10(a). The respondent superior court has concluded in error affirmatively as to both despite the absence of any admissible evidence of fraud or forgery or a conspiracy to commit such acts by these specially appearing defendants or an alter ego relationship between specially appearing defendants and other named defendants in this action. In short, the inclusion in a complaint of alter ego allegations does not automatically give the trial court jurisdiction over the defendant against whom such allegations are directed. The plaintiff, in opposing a defendants motion to quash, must present evidence to justify a finding that the requisite jurisdictional minimum contacts exist (*Floveyor Internat., Ltd. v. Superior Court* (1997) 59 Cal. App. 4th 789, 793 [69 Cal. Rptr. 2d 457] quoted by (*Sonora Diamond Corporation v. Superior Court* (2000) 83 Cal. App. 4th 523.) As this burden has not been met in this case, an appropriate writ of mandate and or prohibition should issue in this case.

The second issue presented is whether California is truly the most convenient forum in which to try this case, when ten of the thirteen parties are foreign and eleven out of thirteen are non California parties, including the plaintiff. It is undisputed that as stated above, the case involves films physically produced and financed in Canada and/or the United Kingdom by primarily Canadians. Further, all defendants are alleged to be agents of each other. The majority of witnesses do in fact reside in Canada, not California, a fact not disputed by the real party in interest. Under the circumstances, petitioners again request that an appropriate writ of mandate and or prohibition should issue in this case.

Appropriateness of Writ review.

30. A petition for writ of mandate is the appropriate method to challenge an order denying a motion to quash service of summons for lack of personal jurisdiction or to stay or dismiss the action on the ground of inconvenient forum. (C.C.P. Sec. 418.10(c); *Hunt v. Superior Court* (2000) 81 Cal. App. 4th 901, 905; See also *Community Redevelopment Agency v. Superior Court (Maynard)* (1967) 248 Cal. App. 2d 164, 180; writ of prohibition may issue to prevent further proceedings following improper denial of motion to quash. In the event that this writ is not reviewed at this time, petitioners may be required to defend an extremely expensive action in another country that petitioners are steadfast in their belief has no jurisdiction over them and one that presents an extremely inconvenient forum to them. Conversely, the real party in interest is a bank with billions of dollars in assets and clearly has the financial wherewithal to prosecute this action in Canada, the place truly giving

rise to this dispute. Accordingly, petitioners respectfully submit that it is essential that this matter be reviewed at this time.

PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully pray for the following relief:

1. Peremptory Writ of Mandate compelling Respondent to vacate its Order denying the motion to quash service of summons and to stay or dismiss this action against specially appearing defendants on grounds of forum non conveniens;

2. Alternatively, a Writ of Prohibition preventing further proceedings against specially appearing defendants herein;

3. An award to Petitioners of their costs pursuant to rule 56.4 of the California Rules of Court; and

4. Such other and further relief as may be just and proper.

Dated: January 3, 2005

COSTA, ABRAMS & COATE, LLP

By: /s/ Charles M. Coate
Charles M. Coate
Attorneys For Petitioners
Greenlight Film &
Television, Inc. and
Gary Howsam

VERIFICATION

I, CHARLES M. COATE, declare as follows:

1. I am an attorney at law duly licensed to practice before the Courts of the State of California and am a partner of Costa Abrams & Coate, llp and one of the attorneys for the petitioners herein. I have read the foregoing petition for writ of mandate, prohibition or other appropriate relief and know its contents. The facts alleged in the petition are within my own knowledge, except where they are stated on information and, as to them, I believe them to be true. If called upon to do so, I could and would competently testify to them.

2. Exhibits A, 1 through 30 in the accompanying Exhibits Re Petition For Writ of Mandate, Prohibition or Other Appropriate Relief are true and correct copies of the original documents.

3. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and executed on this 3rd day of January, 2005 at Santa Monica, California.

/s/ Charles M. Coate
CHARLES M. COATE

MEMORANDUM OF POINTS AND AUTHORITIES.

I. PETITIONERS ARE ENTITLED TO A DE NOVO REVIEW IN THIS CASE.

A petition for writ of mandate is the appropriate method to challenge an order denying a motion to quash service of summons for lack of personal jurisdiction.

(*McCorkle v. City of Los Angeles* (1969) 70 Cal. 2d 252, 256-257 [74 Cal. Rptr. 389, 449 P.2d 453].) Review is de nova where the facts are undisputed. (*Hall v. LaRonde* (1997) 56 Cal. App. 4th 1342, 1346 [66 Cal. Rptr. 2d 399]) In this case, no oral testimony was heard and it is undisputed that the parties agree that all facts submitted in evidence before this Court is what was submitted to the trial court below. Even under the substantial evidence review standard, which should not apply here, as set forth below, the trial court's decision is not supported by substantial evidence.

II. THE REAL PARTY IN INTEREST FAILED TO OFFER COMPETENT ADMISSIBLE EVIDENCE THAT JURISDICTION OVER SPECIALLY APPEARING DEFENDANTS EXISTED, LET ALONE ESTABLISHED ITS BURDEN BY A PREPONDERANCE OF THE EVIDENCE.

Where as here, personal jurisdiction "is challenged by a non-resident (in this case foreign) defendant(s), the burden of proof is upon the Plaintiff to demonstrate that 'minimum contacts' exist between defendant and the forum state to justify imposition of personal jurisdiction." *Shearer v. Superior Court*, 70 Cal. App. 3d. 424, 430 (1977). Plaintiff must demonstrate "by a preponderance of the evidence that all necessary jurisdictional criteria are met." An unverified complaint may *not* be considered as an affidavit supplying necessary facts, and is of no evidentiary value in determining personal jurisdiction. *Ziller Elec. Lab. GmbH v. Superior Court*, 206 Cal. App. 3d 1222, 1232-33 (1988); *Mihlon v. Superior Court*, (1985) 165 Cal. App. 3d 703, 710. Correspondingly, jurisdictional facts must be proved by competent evidence. *Evangelize China*

Fellowship, Inc. v. Evangelize China Fellowship, Inc. (1983) 146 Cal. App. 3d 440, 444. In turn, hearsay declarations are not competent proof of facts alleged. *Floveyor Int'l Ltd. v. Sup. Ct.* (1997) 59 Cal. App. 4th 789, 796: declaration by plaintiff's attorney stating "discovery in this case revealed . . . "was "nothing more than inadmissible hearsay."

According to commentators Weil & Brown, declarations should be obtained from persons with personal knowledge of defendant's activities in California. Mere allegations claiming "personal knowledge" may not suffice if the source of such knowledge is unclear. Weil & Brown, *CIV. PRO. BEFORE TRIAL* (TRG 2004) [3:389.1]

Moreover, where jurisdiction is asserted on the basis of defendant's having caused tortious effects in California, defendant may defeat jurisdiction by unequivocal proof that it did not cause Plaintiff's injury. Plaintiff "cannot demand that we judge the question of jurisdiction in the light of a claim he apparently does not have." *J.M. Sahlein Music Co., Inc. v. Nippon Gakki Co., Ltd.* (1987) 197 Cal. App. 3d 539, 545. Where there are conflicts in the evidence, the trial court may decide who to believe. *Evangelize China Fellowship, Inc. v. Evangelize China Fellowship, Inc., supra.*

Here, as the evidentiary objections to the declarations of Robert S. Addison, Jr., Carmen Carpenter and G. Raymond F. Gross memorialized, the declarations submitted by Plaintiff were rife with hearsay, unsubstantiated conclusions and statements that were not based on personal knowledge. There was simply no competent admissible evidence submitted by the real party in interest that petitioners committed any fraudulent or tortious act in

California that would force these foreign petitioners to submit to jurisdiction in this court. In the absence of admissible competent evidence in support of the real party in interest's position, let alone by a preponderance of the evidence, a peremptory writ of mandate should issue.

III. CALIFORNIA LAW DOES NOT RECOGNIZE REAL PARTY IN INTEREST'S THEORY THAT CONSPIRACY TO DEFRAUD SERVES AS AN ADEQUATE BASIS FOR ACQUIRING JURISDICTION OVER A PARTY.

The thrust of real party in interest's case is that specially appearing defendants among other local co-defendants conspired to create false license agreements and assignments to defraud the real party in interest. (See Petitioner's Exhibits, Vol. I, Ex. A, Para. 23 of First Amended Complaint and Third Cause of Action at Paras. 113-116). However, there was no competent admissible evidence submitted by the real party in interest that one alleged false or fraudulent document was presented to it by petitioners herein. Moreover, California law does not recognize conspiracy as a basis for acquiring personal jurisdiction over a party. [Indeed,] the cases expressly considering the issue have rejected it. *Mansour v. Superior Court* (1995) 38 Cal. App. 3d 1750, 1760 quoting (*Kaiser Aetna v. Deal* (1978) 86 Cal. App. 3d 896, 901 [150 Cal. Rptr. 615] [action arising from fraudulent land transactions; "Allegations of conspiracy do not establish as a matter of law that if there is one resident conspirator, jurisdiction may be exercised over nonresident conspirators."]; *Kipperman v. McCone* (N.D.Cal. 1976) 422 F. Supp. 860, 873, fn. 14 [action involving illegal mail surveillance; applying California law; "personal jurisdiction over any

non-resident individual must be premised upon forum-related acts personally committed by the individual. Imputed conduct is a connection too tenuous to warrant the exercise of personal jurisdiction."]; *Edmunds v. Superior Court* (1994) 24 Cal. App. 4th 221, 233 [29 Cal. Rptr. 2d 281].

Therefore, even though the real party in interest named local defendants in the action, the adding of foreign specially appearing petitioners herein as purported named co-conspirators does not magically boot strap the real party in interest into asserting jurisdictionally defective claims against petitioners herein. In short, there is nothing in the evidence presented to this court that these foreign specially appearing petitioners who have *no* contractual ties with the real party in interest, in any way committed a fraud in California. There was nothing presented by the real party in interest evidencing that Greenlight Film & Television Inc. and/or Gary Howsam somehow forged distribution agreements or notices of assignment. On the other hand, petitioner Gary Howsam categorically and emphatically denied that such alleged events occurred. On the basis of the record before this court, the real party in interest's theory could not support a finding of jurisdiction against petitioners and a writ of mandate and or prohibition is warranted in this case.

IV. THE REAL PARTY IN INTEREST FAILED TO ESTABLISH JURISDICTION BY A PREPONDERANCE OF COMPETENT ADMISSIBLE EVIDENCE AS TO SPECIALLY APPEARING PETITIONER HOWSAM AND GREENLIGHT FILM & TELEVISION INC. UNDER ITS ALTER EGO THEORIES.

The analysis to be employed by the trial court when one of the bases for asserting personal jurisdiction over a

foreign defendant is the alter ego doctrine was recently explained in *Sonora Diamond Corp. v. Superior Court*, (2000) 83 Cal. App. 4th 523. In *Sonora* the Court of Appeal of California, Fifth Appellate District granted a petition for writ of mandate denying a motion to quash service of process and ordered the motion granted holding that the inclusion of alter ego allegations does not automatically give the trial court jurisdiction over the defendant against whom such allegations are directed. In arriving at its conclusion the Fifth Appellate District stated:

> A. Alter Ego
>
> In the trial court, the District argued it proved Sonora Mining was the alter ego of Diamond and therefore that the corporate identity of Sonora Mining should be disregarded. As a result, the District took the position Sonora Mining's actions and presence in California must be attributed to Diamond, so that in legal effect Diamond was a California corporation engaged in an ongoing California business and subject to the general jurisdiction of the California courts (see *AT&T*, supra, 94 F.3d at p. 591; *Alberto v. Diversified Group, Inc.* (5th Cir. 1995) 55 F.3d 201, 205; *Wells Fargo & Co. v. Wells Fargo Exp. Co.* (9th Cir. 1977) 556 F.2d 406, 415).[6]

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[6] The District maintains that the alter ego theory of jurisdiction is not at issue on this appeal because this was not the ground relied upon by the trial court to deny Diamond's motion. However, whatever the basis for the trial court's decision, the alter ego theory was raised in the trial court and we must therefore address it because we must affirm if the trial court's ruling

can be sustained on any ground presented to that court. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 340, pp. 382-383.)

Ordinarily, a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations. (*Wenban Estate, Inc. v. Hewlett* (1924) 193 Cal. 675, 696 [227 P. 723]; *Communist Party v. 522 Valencia, Inc.* (1995) 35 Cal. App. 4th 980, 993 [41 Cal. Rptr. 2d 618]; *Robbins v. Blecher* (1997) 52 Cal. App. 4th 886, 892 [60 Cal. Rptr. 2d 815 J.) A corporate identity may be disregarded – the "corporate veil" pierced – where an abuse of the corporate privilege justifies holding the equitable ownership of a corporation liable for the actions of the corporation. (*Roman Catholic Archbishop v. Superior Court* (1971) 15 Cal. App. 3d 405, 411 [93 Cal. Rptr. 338].) Under the alter ego doctrine, then, when the corporate form is used to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, the courts will ignore the corporate entity and deem the corporation's acts to be those of the persons or organizations actually controlling the corporation, in most instances the equitable owners. (*Robbins v. Blecher,* supra, 52 Cal. App. 4th at p. 892; *Communist Party v. 522 Valencia, Inc.*, supra, 35 Cal. App. 4th at pp. 993-994.) The alter ego doctrine prevents individuals or other corporations from misusing the corporate laws by the device of a sham corporate entity formed for the purpose of committing fraud or other misdeeds. (*Associated Vendors, Inc. v. Oakland Meat Co.* (1962) 210 Cal. App. 2d 825, 842 [26 Cal. Rptr. 806].)

In California, two conditions must be met before the alter ego doctrine will be invoked. First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone. (*Automotriz etc. De California v. Resnick* (1957) 47 Cal. 2d 792, 796 [306 P.2d 1, 63 A.L.R.2d 1042]; *Hennessey's Tavern, Inc. v. American Air Filter Co.* (1988) 204 Cal. App. 3d 1351, 1358 [251 Cal. Rptr. 859]; *Alberto v. Diversified Group, Inc.*, supra, 55 F.3d at p. 205; Calvert, supra, 875 F. Supp. at p. 678.) Among the factors to be considered in applying the doctrine are commingling of funds and other assets of the two entities, the holding out by one entity that it is liable for the debts of the other, identical equitable ownership in the two entities, use of the same offices and employees, and use of one as a mere shell or conduit for the affairs of the other." (*Roman Catholic Archbishop v. Superior Court*, supra, 15 Cal. App. 3d at pp. 406, 411; *Associated Vendors, Inc. v. Oakland Meat Co.*, supra, 210 Cal. App. 2d at pp. 838-839.) Other factors which have been described in the case law include inadequate capitalization, disregard of corporate formalities, lack of segregation of corporate records, and identical directors and officers. (See *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal. App. 4th 1269, 1285 [31 Cal. Rptr. 2d 433]; *Associated Vendors, Inc. v. Oakland Meat Co.*, supra, 210 Cal. App. 2d at pp. 838-839; *Alberto v. Diversified Group, Inc.*, supra, 55 F.3d at p. 205.) No one characteristic governs, but the courts must look at all the circumstances to determine whether the doctrine should be applied. (*Talbot v.*

Fresno-Pacific Corp. (1960) 181 Cal. App. 2d 425, 432 [5 Cal. Rptr. 361].) Alter ego is an extreme remedy, sparingly used. (*Calvert*, supra, 875 F. Supp. at p. 678.)

Here, at least one of the two essential elements of the alter ego doctrine was not established; there was no evidence of any wrongdoing by either Diamond or Sonora Mining or any evidence of injustice flowing from the recognition of Sonora Mining's separate corporate identity. Without such evidence, the alter ego doctrine cannot be invoked. (*Meadows v. Emett & Chandler* (1950) 99 Cal. App. 2d 496, 498 [222 P.2d 145]; *Alberto v. Diversified Group, Inc.*, supra, 55 F.3d at p. 205; see also *Tomaselli v. Transamerica Ins. Co.*, supra, 25 Cal. App. 4th at p. 1285; *Calvert*, supra, 875 F. Supp. at p. 678.)

Misconduct or injustice was not proved by Sonora Mining's apparent inability to meet the balance of its endowment obligation to the District. The alter ego doctrine does not guard every unsatisfied creditor of a corporation but instead affords protection where some conduct amounting to bad faith makes it inequitable for the corporate owner to hide behind the corporate form. Difficulty in enforcing a judgment or collecting a debt does not satisfy this standard. (*Associated Vendors, Inc. v. Oakland Meat Co.*, supra, 210 Cal. App. 2d at p. 842; *Alberto v. Diversified Group, Inc.*, supra, 55 F.3d at p. 207; *Lowell Staats Min. Co. v. Pioneer Uravan, Inc.* (10th Cir. 1989) 878 F.2d 1259.)

Similarly misconduct or injustice was not proved by the many advances made by Diamond for the benefit of Sonora Mining because none were shown to have been made with a fraudulent

or deceptive intent. (*Lowell Staats Min. Co. v. Pioneer Uravan, Inc.*, supra, 878 F.2d at p. 1262.) The parent is not "exposed to liability for the obligations of [the subsidiary] when [the parent] contributes funds to [the subsidiary] for the purpose of assisting [the subsidiary] in meeting its financial obligations and not for the purpose of perpetrating a fraud." (Id. at p. 1263.)

As we understand the District's argument, it maintains in part that, because it raised the alter ego doctrine as a substantive issue in its complaint against Diamond, it was not obliged to prove such allegations in order to establish jurisdiction on that ground. The District cites the rule that a motion to quash for lack of personal jurisdiction does not put the merits of the complaint at issue. (*Kroopf v. Guffey* (1986) 183 Cal. App. 3d 1351, 1360 [228 Cal. Rptr. 807].)

The District is plainly wrong to the extent it claims the inclusion in a complaint of alter ego allegations automatically gives the trial court jurisdiction over the defendant against whom such allegations are directed. It is correct that a motion to quash for lack of personal jurisdiction does not implicate the merits of the complaint, but the plaintiff, in opposing the defendant's motion to quash, must present evidence to justify a finding that the requisite jurisdictional minimum contacts exist (*Floveyor Internat., Ltd. v. Superior Court* (1997) 59 Cal. App. 4th 789, 793 [69 Cal. Rptr. 2d 457]; see generally 2 Witkin, Cal. Procedure (4th ed. 1996) Jurisdiction, § 211, pp. 775-776.) (Emphasis Added.) (*Sonora Diamond Corporation, supra.* at 835-837.)

Here, there was absolutely nothing inequitable or untoward about the forming of the subject production

company entities. Indeed, each was created in accordance with the specific requirements of the real party in interest. Absent the creation of each of these production companies, no films would be produced or funded. Similarly, a claim of undercapitalization as a reason to pierce the corporate veil with respect to each production company would render virtually every non-studio movie made today a fraud by definition. Simply, if the mere formation of these production entities perpetrated a fraud, then every production loan made by real party in interest in connection with every motion picture that it funds is also a fraud. Nor, should real party in interest be permitted to avail itself of California law on the alter ego issue against Canadian nationals with which it has no contractual privity or relationship with as Canadian law applies such standards in a vastly different manner.

Indeed, the competent evidence submitted on the record before this court indicated the following of corporate formalities by defendants herein, a lack of ownership by petitioner Howsam in the subject production company defendants, segregated finances by defendants and adherence to corporate records, inter alia. There was an utter failure by the real party in interest to prove by a preponderance of admissible evidence that these Canadian petitioners who have no contractual privity with the real party in interest in this action can be found to be alter egos of their co-defendants herein for purposes of establishing jurisdiction over them. Petitioners respectfully request that a writ of mandate to require the respondent court to enter its order quashing the service of summons or staying or dismissing the action or alternatively, request that a writ of prohibition issue to prevent further

proceedings following this improper denial of petitioner's motion to quash.

V. A WRIT OF MANDATE AND OR PROHIBITION IS ALSO WARRANTED UNDER A TRADITIONAL FORUM *NON CONVENIENS* ANALYSIS.

In *Stangvik v. Shiley, Inc.*, the California Supreme Court provided a test to use when determining whether to grant a motion based on forum *non conveniens*. First, a court must determine whether an alternative forum is a "suitable" place for trial. If it is, the next step is to consider the private interests of the litigants and the interests of the public in retaining the action for trial in California. *Stangvik v. Shiley Inc.*, 54 Cal. 3d 744, 751 (1991), C.C.P. § 410.30. Under this analysis, this motion should be granted.

A. Canada Is A "Suitable" Forum.

In determining whether to grant a motion based on forum *non conveniens*, a court must first determine whether the alternative forum is a "suitable" place for trial. Here, Canada is a suitable place for trial of the real party in interest's claims. Real party in interest does not dispute that it could litigate its claims against Mr. Howsam and GFTI for breach of contract, an accounting, fraud and an account stated in Canadian courts (such as those located in Toronto).

The real party in interest claims that this motion must be denied because Adam Benecke and Michele Glockler (who are tangential defendants) are not subject to personal jurisdiction in Canada. Based on real party in interest's agency theory, real party in interest would

presumably have jurisdiction over all agents assuming it could prove the existence of such agency. Nor did real party in interest provide any evidence for its supposition. Indeed, such position is not the law. Rather, the "primary" defendants must be subject to personal jurisdiction in Canada. In cases involving a large number of defendants, such as the present one, courts have held that "it is unreasonable to expect the moving defendant to prove *all* defendants are subject to jurisdiction in a particular alternative forum." *Hansen v. Owens-Corning Fiberglass Corp.* (1996) 51 Cal.App.4th 753, 759. [stating case law neither "states or implies all defendants must be subject to jurisdiction in an alternative forum before an order staying an action can be affirmed"]; *see also* (2000) 13 *Transnational Law* 175, 217.

B. The Private Factors Favor Litigation In Canada.

Real party in interest failed to dispute the fact that it would be extremely inconvenient and unreasonable to require Mr. Howsam and GFTI to defend this action in a Los Angeles Court, since most of their evidence, documents and witnesses needed for a proper defense are in Canada. (*Credit Lyonnais Bank Nederland, NV v. Manatt Phelps* (1988) 202 Cal. App. 3d 1424, 1437). Furthermore, real party in interest simply ignored the fact that at least twenty (20) percipient Canadian witnesses were identified by Mr. Howsam who are not subject to the subpoena power of California. The sheer number of important and percipient witnesses identified above point to the inescapable conclusion that the private factors militate in favor of staying or dismissing this California action.

In contrast real party in interest merely listed fifteen (15) individuals located in Los Angeles County, without indicating their position or the subject of their testimony. Therefore, it was impossible for the trial court to discern if these witnesses would be important, or even necessary for real party in interest's claims. For this reason, it is undisputed that the majority of percipient witnesses reside in Canada, and strongly tilted the private factors in favor of the moving parties.

C. The Public Factors.

Real party in interest previously argued that California courts have a strong public interest in providing a forum for California residents. Nor, is real party in interest even a California resident or corporation incidentally. Notwithstanding, the residency of the plaintiff is not determinative when making a *non conveniens* analysis. A court is permitted to exercise its discretion to dismiss an action on inconvenient forum grounds, even though the action may involve a California plaintiff. *Klein v. Superior Court* (1988) 197 Cal.App.3d 1217, 1223; *Credit Lyonnais Bank* at 1434.

In turn, California courts do not automatically defer to a resident plaintiff's decision to sue in California. For instance, in *Dendy v. MGM Grand Hotels, Inc.* (1982) 137 Cal.App.3d 457, the trial court stayed a lawsuit filed in California by San Diego residents arising out of the MGM Grand Hotel fire in Las Vegas. The Court of Appeal affirmed, allowing the litigation to proceed instead in Nevada. (*See also Archibald v. Cinerama Hotels* (1976) 15 Cal.3d 853, 860 ["the trial court retains a flexible power to stay actions by true California residents when it finds that

the foreign forum is preferable"]; *Hansen v. Owens-Corning Fiberglas Corp.* (1996) 51 Cal.App.4th 753 [California court has the power to stay an action for forum non conveniens even if the sole plaintiff is a California resident]; *Century Indemnity Co. v. Bank of America* (1997) 58 Cal.App.4th 408 [action by California resident insurer stayed pending litigation in Hawaii].

This is a case where the public interest factors are significant for Canadian courts. That is because the motion picture industry is also an important industry in Canada, especially Toronto, which is considered Canada's entertainment capital. Conversely, California has little interest in a dispute involving a Michigan plaintiff, various international distributors, and numerous Canadian defendants who made and produced motion pictures in Canada with Canadians.

CONCLUSION.

For the reasons set forth herein, specially appearing Petitioners Greenlight Film & Television Inc. and Gary Howsam, a Canadian corporation and a Canadian national, respectfully request this court to grant extraordinary writ relief as prayed and issue a writ of mandate pursuant to C.C.P. Sec. 415.10(c) to require the respondent court to enter its order quashing the service of summons or staying or dismissing the action. Alternatively, petitioners request that a writ of prohibition issue to prevent further proceedings following this improper denial of petitioner's motion to quash or staying or dismissing the action.

Dated: January 3, 2005

COSTA, ABRAMS & COATE, LLP

By: /s/ Charles M. Coate
Charles M. Coate
Attorneys For Petitioners
Greenlight Film &
Television, Inc. and
Gary Howsam

CERTIFICATE OF WORD COUNT

Pursuant to Cal. Rule of Court, rule 14(c)(1), 56(b)(6), the text of this petition consists of 7947 words as counted by the Microsoft Word version 2000 word-processing program used to generate this petition.

Dated: January 3, 2005

COSTA, ABRAMS & COATE, LLP

By: /s/ Charles M. Coate
Charles M. Coate
Attorneys For Petitioners
Greenlight Film &
Television, Inc. and
Gary Howsam

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1221 Second Street, Third Floor, Santa Monica, California 90401.

On January 6, 2005, I served the foregoing document described as on the interested parties in this action by placing a copy thereof enclosed in a sealed envelope as follows:

PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES; SUPPORTING EXHIBITS

[X] (**BY MAIL**) I deposited such envelope in the mail at Santa Monica, California. The envelope was mailed with postage fully prepaid. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on the same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

[ ] (**BY PERSONAL SERVICE/MESSENGER**) I caused such envelope to be delivered by hand by messenger Service to the offices of the addressee(s).

A. Raymond Hamrick, III, Esq.
Hamrick & Evans, LLP
10 Universal City Plaza, Suite 2200
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Clerk, Los Angeles County Superior Court
Attn: Writ Dept
For: The Hon. Andria K. Richey
111 N. Hill St.
Room 204
Los Angeles, California 90012 (petition only)

[ ] **(BY TELEFAX)** I caused such document to be transmitted via telefax to the offices of the addressee(s), telefax number:

[ ] **(BY FEDERAL EXPRESS)** I delivered such envelope on the interested party below by placing a true copy thereof in a sealed Federal Express envelope and by placing said envelope for overnight delivery in a box or other facility regularly maintained by Federal Express to receive documents, with said envelope

[X] **(STATE)** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made

Executed on January 6, 2005, at Santa Monica, California.

/s/ [Illegible]
Adam Us

Charles M. Coate, Esq., State Bar Number 140404
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1221 Second Street, Third Floor
Santa Monica, California 90401
(310) 859-6644
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Attorneys for Specially Appearing Defendants,
Greenlight Film & Television Inc., an Ontario, Canada
Corporation and Gary Howsam, an Individual
and Canadian National

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

COMERICA BANK, a Michigan Banking Corporation, Plaintiff, vs. GARY HOWSAM, an individual; GFT ENTERTAINMENT, INC., an Ontario corporation, also known as GFTE, Inc., and successor to GREENLIGHT FILM AND TELEVISION, INC. D/B/A GFT ENTERTAINMENT, an Ontario Corporation; GFT CIRCLE FILMS, INC., an Ontario Corporation; ROAD RAGE FILMS, INC., a Corporation of unknown origin; JANUS PRODUCTIONS, INC., a Quebec Corporation; GFT GOING BACK FILMS, INC.,	Case No.: BC 316406 [The Honorable Andria K. Richey] **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS MOTION TO QUASH SERVICE OF SUMMONS FOR LACK OF PERSONAL JURISDICTION [C.C.P. § 418.10]** **[SERVED AND FILED CONCURRENTLY WITH DECLARATION OF GARY HOWSAM]** [Complaint Filed: June 1, 2004] Date November 17, 2004 Time: 8:30 a.m. Dept. 31

an Ontario Corporation; GFT/REDWOOD KOTN FILMS, INC., a British Columbia Corporation; GFT/REDWOOD IGNITION FILMS, INC., a British Columbia Corporation; ADAM BENECKE, an individual; MICHEL GLOCKLER, an individual; and DOES 1 Through 100, inclusive, Defendants.	Discovery Cut-off: None Motion Cut-off: None Trial Date: None

(Filed Oct. 27, 2004)

I.

INTRODUCTION

Defendant Greenlight Film & Television Inc. is a Canadian corporation formed in 1997 in the province of Ontario, Canada. Its principal place of business is in Toronto, Canada. Defendant Gary Howsam is a Canadian citizen residing in Toronto, Canada and is the President of Greenlight Film & Television Inc. Neither Defendant conducts any business in California and neither entity has ever had the wide ranging, substantial, continuous and systematic contacts necessary to confer general jurisdiction. Nor, has either Defendant entered into any loan or interparty contract with the Michigan Plaintiff upon which Plaintiff bases its claims In addition, neither Defendant has minimum contacts with California sufficient to support a finding of specific jurisdiction. Thus, this out of state Plaintiff cannot meet its burden of establishing any purposeful availment by these foreign Defendants of the benefits of California law, much less, the requisite

substantial nexus between this Michigan Plaintiff's claims and the foreign Defendants' non existent activities in California. Moreover, at least *twenty* (20) third party witnesses to relevant events reside in Canada. Accordingly, specially appearing Defendants Motion to Quash for lack of personal jurisdiction should be granted in its entirety.

II.

STATEMENT OF FACTS

Gary Howsam is an individual over 18 years of age and is a citizen of the province of Ontario, Canada residing in Toronto Canada. He is the President of Greenlight Film & Television Inc. ("GFTI") a corporation existing under the laws of Ontario, Canada which maintains its principal place of business at 124 Merton Street, Suite 407, Toronto, Ontario M4S 2Z2. (Declaration of Gary Howsam at P 2, ¶ 2)

GFTI is not now and has never been qualified to do business in the state of California. (Declaration of Gary Howsam at P 2, ¶ 3)

None of GFTI's officers or directors, including Mr. Howsam, reside or are domiciled in the state of California. (Declaration of Gary Howsam at P 2, ¶ 4).

GFTI has no employees, residing or domiciled in California. (Declaration of Gary Howsam at P 2, ¶ 5). GFTI has no branch office or comparable facilities in California, and has no telephone listings or mailing addresses in California. (Declaration of Gary Howsam at P 2, ¶ 6). Neither GFTI nor Mr. Howsam maintain any bank accounts or other tangible personal or real property in the

State of California. (Declaration of Gary Howsam at P 2, ¶ 7).

GFTI does not direct any of its advertising specifically toward California residents nor does it advertise in publications that are directed primarily toward California residents. (Declaration of Gary Howsam at P 2, ¶ 8).

No meetings of GFTI's board of directors or shareholders have been held in California; none of its officers or directors have attended business conferences in such capacities within the state of California. (Declaration of Gary Howsam at P 2, ¶ 9).

At no time has Mr. Howsam or GFTI ever entered into any of the loan or interparty contracts which form the basis of Plaintiff's claims, nor has Mr. Howsam or GFTI ever executed an agreement with Plaintiff concerning the loaning of any money by Plaintiff to Mr. Howsam individually. Nor has Mr. Howsam individually or GFTI ever requested that Plaintiff loan money to Mr. Howsam individually or on behalf of GFTI, (Declaration of Gary Howsam at P 2, ¶ 10).

Further, it would be unreasonable to require Defendants GFTI and Mr. Howsam to defend this action in courts within California for the following reasons:

a. It would be unduly burdensome to require GFTI and Mr. Howsam to defend this action in the state of California as neither GFTI or Mr. Howsam have undertaken steps to purposefully avail themselves of the jurisdiction of the state of California;

b. A proper alternative forum for this dispute readily exists in Ontario, Canada;

c. Ontario, Canada will be the most efficient forum to resolve this dispute as at least 20 witnesses concerning the alleged obligation to Plaintiff are within the jurisdiction of Ontario, Canada;

d. California has little interest in a dispute involving the alleged non-payment of film distribution obligations between a Michigan Plaintiff and other Canadian Defendants. (Declaration of Gary Howsam at P 2 and P 3, ¶ 11).

The following are names and addresses of all persons known by Defendants herein to be percipient witnesses to any of the matters raised in the pleadings in this action and the matters upon which they are expected to testify:

a. Gary Howsam resides in Toronto, Ontario, Canada and will testify to the matters set forth in his declaration on his own behalf on behalf of GFTI;

b. Greenlight Film and Television Inc. is a Toronto, Ontario, Canada Corporation and it expected to testify to the matters to which its employees are percipient witnesses;

c. Plaintiff is a corporation existing under the laws of the State of Michigan. It is unknown what Plaintiff will testify to. (Declaration of Gary Howsam at P 3, ¶ 12).

Further, the interests of justice and the convenience of the parties and witnesses would be served by transferring this action to Ontario, Canada for the following reasons:

a. It would be burdensome and inconvenient for the majority of the witnesses set forth above to attend a trial in California because of the

expense of travel away from their business and other pursuits.

b. It would not be possible to subpoena at least *twenty (20)* third parties based in Canada for trial in California; while they are subject to process in Ontario, Canada to which transfer is sought.

c. All of the books and records of GFTI and Mr. Howsam and presumably third parties based in Canada such as Co-Defendants herein are primarily located in Ontario, Canada in which transfer is sought.

d. Finally, a transfer will serve the interests of judicial economy; will prevent a waste of time and money; and Ontario, Canada presents a forum with relevant ease of access to proof as well as the availability of compulsory process regarding conduct to have alleged to have occurred in this case. (Declaration of Gary Howsam at P 3, ¶ 13).

III.

THERE IS NO BASIS FOR ANY ASSERTION OF PERSONAL JURISDICTION AGAINST DEFENDANTS GREENLIGHT FILM & TELEVISION INC., A CANADIAN CORPORATION AND GARY HOWSAM, A CANADIAN NATIONAL.

The extent to which a California court can exercise personal jurisdiction over a defendant depends on the nature and quality of that defendant's "contacts" with the state. As the California Supreme Court stated in *Vons Companies, Inc. v. Seabest Foods, Inc.*, 14 Cal. 4th 434 (1996):

> Personal jurisdiction may be either general or specific. A non-resident defendant may be subject to the general jurisdiction of the forum if his or her contacts in the forum state are 'substantial . . . continuous and systematic.' . . . If the non-resident defendant does not have substantial and systematic contacts in the forum sufficient to establish general jurisdiction, he or she still may be subject to the specific jurisdiction of the forum, if the defendant has purposefully availed himself or herself of forum benefits (citation omitted) and the 'controversy is related to or arises out of a defendant's contacts with the forum.' (citations omitted)

Id. at 445-446

Where as here, personal jurisdiction "is challenged by a non-resident defendant the burden of proof is upon the Plaintiff to demonstrate that 'minimum contacts' exist between defendant and the forum state to justify imposition of personal jurisdiction." *Shearer v. Sup. ior Court* 70 Cal. App. 3d. 424, 430 (1977). Plaintiff must demonstrate "by a preponderance of the evidence that all necessary jurisdictional criteria are met." An unverified complaint may *not* be considered as an affidavit supplying necessary facts. *Ziller Elec. Lab. GmbH v. Superior Court*, 206 Cal. App. 3d 1222, 1232-33 (1988). For the reasons set forth below, the Michigan Plaintiff in this action will not be able to meet this burden with respect to either general jurisdiction or special jurisdiction.

A. This Court Does Not Have General Jurisdiction Over Greenlight Film & Television, Inc., and Gary Howsam.

In *Cornelison v. Chaney*, 16 Cal. 3d 143 (1976), the California Supreme Court cited *Perkins & Koninklijke L.M. v. Superior Court*, 107 Cal. App. 2d. 495 (1951), as illustrative of "the type of activity which has been held sufficient for the exercise of general jurisdiction." In *Perkins*, the Defendant was a Dutch airline which had moved all of its administrative functions into California. It had employed some thirty local employees, had made substantial purchases of airplanes in California, and had other local business operations in California. The Court held these activities were sufficient for general jurisdiction. *Id.* At 148-149.

In this case, it is clear that Greenlight Film & Television Inc. and Gary Howsam are not subject to this Court's general jurisdiction as they never engage in sufficiently wide ranging, continuous and systematic economic activities in California. As set forth in the declaration of Gary Howsam, Greenlight Film & Television Inc.:

> Does not manufacture or sell products in California;
>
> Does not own or maintain offices, plants, or other facilities in California;
>
> Does not have employees based in California;
>
> Does not maintain bank accounts in California;
>
> Does not pay taxes in California;
>
> Is not qualified, licensed, or registered to do business in California;

Does not have any agent for service of process in California;

Does not advertise in California.

Nor, does Gary Howsam individually have any such contact. In short, there simply are no wide-ranging continuing and systematic contacts, by these Defendants with California. Accordingly, this Court does not have general jurisdiction over Greenlight Film & Television Inc. or Gary Howsam. Correspondingly, the instant motion should be granted in its entirety.

B. Plaintiff Cannot Meet Its Burden Of Establishing That Greenlight Film & Television Inc. And Gary Howsam Have Minimum Contacts With California Sufficient to Support A Finding of Specific Jurisdiction.

Three criteria must be established in order for this Court to exercise specific jurisdiction under the so-called "minimum contacts" doctrine. First, Plaintiff must show that Greenlight Film & Television Inc. and Gary Howsam "[have] purposefully availed [themselves] of forum benefits . . . " *Shearer v. Superior Court*, 70 Cal. App. 3d. 424, 430 (1977); *Vons Companies, Inc. v. Seabest Foods, Inc., supra*, 14 Cal. 4th at 446. Second, Plaintiff must show that its claim against Greenlight Film & Television Inc. and Gary Howsam "is related to 'or arises out of Green Film & Television Inc. and Gary Howsam's] contacts with the forum". *Id.* As set forth above, Plaintiff bears the burden of proof on these first two criteria: *Vons Companies, supra*, 14 Cal. 4th at 449. Indeed, Howsam's contacts with California as an individual are non existent. Such facts will not

support a finding of specific jurisdiction under California law. *Seagate Technology v. A.J. Kogyo Co.* (1990) 219 Cal. App. 3d 696, 700.

The third criterion – the reasonableness of requiring the Defendant to respond to a lawsuit in California – is only considered if Plaintiff established that the Defendant has minimum contacts with California. *See Vons Companies, supra*, 14 Cal. 4th at 449 ("Once facts showing minimum contacts with the forum state are established, however, it becomes a Defendant's burden to demonstrate that the exercise of jurisdiction would be unreasonable.") Even if Plaintiff could demonstrate that Plaintiff's claims in this action are somehow related to or arise out of Defendants' contacts with the forum, it would be unreasonable to exercise jurisdiction over them when Plaintiff's First Amended Complaint does not contain one contract between such parties with Plaintiff. In sum, it would be unfair and unreasonable for this Court to exercise personal jurisdiction over Defendants under these facts.

1. **Plaintiff Cannot Satisfy Its Burden Of Establishing That Greenlight Film & Television Inc., and Gary Howsam Have Purposefully Availed Themselves Of The Benefits Of California Law.**

As noted in the accompanying declaration of Gary Howsam, Defendants simply do not do any business in California. Plaintiff acknowledges that Greenlight Film & Television Inc. and Gary Howsam are not present in California and are based in Canada. Nor, does Plaintiff allege that Gary Howsam individually or GFTI ever entered into a contract with Plaintiff in California. Even assuming *arguendo* that Plaintiff has somehow alleged

such a contractual relationship in a breach of contract action, which the Court can judicially notice it cannot, it is clear that a non-resident defendant does not necessarily become subject to the specific jurisdiction of the forum state simply by entering into a contract with a resident of the forum. *Vons Companies, supra*, 14 Cal. 4th at 449, citing *Burger King v. Rudzewicz*, 471 U.S. 462 at 478 (1985). In *Burger King, supra*, the U.S. Supreme Court stated:

> If the question is whether an individual's contact with an out-of-state party **alone** can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it can not.

Id. at 478. Similarly, in *Sibley v. Superior Court of Los Angeles County*, 16 Cal. 3d 442 (1976), the Court held the fact that breach may have "caused an effect" in California is insufficient to confer specific jurisdiction over foreign defendant. *Id.* at 446.

In *Burger King*, the Supreme Court held that "mechanical" tests for personal jurisdiction had long been rejected in favor of a "highly realistic" approach considering all factors affecting the negotiation, execution, and performance of the contract "in determining whether the Defendant purposefully established minimum contacts with the forum." *Id.* at 478-479. Any such analysis here readily demonstrates the lack of purposeful availment of the benefits of California by Defendants herein. Specially appearing Defendants respectfully request that the instant Motion be granted in its entirety.

2. Even If Plaintiff Could Meet Its Burden Of Establishing Minimum Contacts, It Cannot Establish A Substantial Relationship Between Those Contacts And Plaintiff's Claims.

Even if this Court finds that Defendants had sufficient contacts with California such that it could be said the Defendants "purposefully availed [themselves] of the privilege of conducting business in California or of the benefits and protections of California laws," *Sibley v. Superior Court of Los Angeles County, supra*, 16 Cal. 3d 442, 447 (1976), it is clear that there is no "substantial nexus between Plaintiffs causes of action and Defendant's activities in California." *Cornelison v. Chaney*, 16 Cal. 3d 143, 149 (1976). There simply is no "substantial nexus" between Plaintiff's claims and any activities of which it could be said that these Defendants sought to avail themselves of the privilege of conducting business in California or of the benefits and protections of California law.

As the U.S. Supreme Court has noted:

> This 'purposeful availment' requirement insures that a Defendant will not be hailed into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts [citations omitted] or of the 'unilateral activity of another party or a third person,' [citations omitted].

Burger King, supra, 471 U.S. at 475. In short, there is no substantial nexus between the subject loan and interparty agreements at issue here and any conceivable minimum contacts between these Canadian Defendants and California. Simply, neither Defendant is a signatory to any of the contracts upon which Plaintiff bases its claims. Such facts

simply cannot support any nexus, let alone a substantial one. The instant motion should be granted in its entirety.

3. It Would Be Inherently Unreasonable And Unfair For the Court To Exercise Personal Jurisdiction Over Greenlight Film & Television Inc., and Gary Howsam Given The Facts Of This Case.

Even assuming *arguendo* that Plaintiff can meet its dual burden of (1) establishing that Defendants have sufficient contacts with California and (2) that those contacts are sufficiently, related to Plaintiff's claims so as to confer specific jurisdiction, this Court should nevertheless decline to exercise jurisdiction because to do so would be inherently unreasonable and unfair given the facts of this case. As noted by the Court in *Burger King*, "minimum requirements inherent in the concept of 'fair play and substantial justice' may defeat the reasonableness of jurisdiction even if the Defendant has purposefully engaged in forum activities." *Id*, at 477-478.

The determination as to the reasonableness of the exercise of jurisdiction requires consideration of a number of factors including:

> [t]he relative availability of evidence and the burden of defense and prosecution in one place rather than another; the interest of the state in providing a forum for its residents or regulating the business involved; the ease of an alternative forum; the avoidance of a multiplicity of suits and conflicting adjudications; and the extent to which the cause of action arose out of Defendant's local activities. *Cornelison, supra*, 16 Cal. 3d at 150, citing *Fisher Governor Company v. Superior Court of San Francisco* 53 Cal. 2d 222 (1959).

Here none of these considerations support an assumption of jurisdiction in this case. Plaintiff's causes of action do not arise out of and are not related to any activities by these Defendants in this state. Rather, this action arises out of contracts to which Defendants herein are not parties. Based on the myriad of exhibits attached to Plaintiff's First Amended Complaint it is clear that no contractual relationship exists between this Michigan Plaintiff and these Canadian Defendants bringing this motion. Moreover, at least twenty witnesses to relevant events reside in Canada. Accordingly, the instant Motion to Quash should be granted in its entirety pursuant to C.C.P. Sec. 418.10.

IV.

CONCLUSION

For all of the above and foregoing reasons, Defendants Gary Howsam and Film & Television Inc. respectfully request that this Court decline jurisdiction over them in this action and grant the instant motion with prejudice.

Dated: October 27, 2004

Respectfully submitted,
Costa, Abrams & Coate, LLP

By: /s/ Charles M. Coate
CHARLES M. COATE
Attorneys for Specially Appearing Defendants Greenlight Film & Television Inc., a Canadian Corporation and Gary Howsam, an individual And Canadian National

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1221 Second Street, Third Floor, Santa Monica, California 90401.

On October 27, 2004, I served the foregoing document described as on the interested parties in this action by placing a copy thereof enclosed in a sealed envelope as follows:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS MOTION TO QUASH SERVICE OF SUMMONS FOR LACK OF PERSONAL JURISDICTION [C.C.P. §418.10]

[ ] **(BY MAIL)** I deposited such envelope in the mail at Santa Monica, California. The envelope was mailed with postage fully prepaid. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on the same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

[x] **(BY PERSONAL SERVICE/MESSENGER)** I caused such envelope to be delivered by hand by messenger Service to the offices of the addressee(s).

Michael Wachtell, Esq.
BUCHALTER, NEMER FIELDS & YOUNGER
601 S. Figueroa Street
Suite 2400
Los Angeles, CA 90017-5704

[ ] **(BY TELEFAX)** I caused such document to be transmitted via telefax to the offices of the addressee(s), telefax number:

[ ] **(Federal)** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on October 27, 2004, at Santa Monica, California.

/s/ Charles M. Coate
Charles M. Coate

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT 31 HON. ANDRIA K. RICHEY, JUDGE

COMERICA BANK, A MICHIGAN BANKING CORPORATION,	)	
PLAINTIFF,	)	
VS.	)	NO. BC316406
GARY HOWSAM, AN INDIVIDUAL, ET AL.,	)	
DEFENDANTS.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

WEDNESDAY, DECEMBER 15, 2004

APPEARANCES:

FOR PLAINTIFF: BUCHALTER, NEMER, FIELDS & YOUNGER
BY: ROBERT S. ADDISON, JR., ESQ.
BY: MICHAEL WACHTELL, ESQ.
BY: RONALD K. SITTLER, ESQ.
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LOS ANGELES, CALIFORNIA 90017

FOR DEFENDANT HOWSAM, GFTE: COSTA, ABRAMS & COATE LLP
BY: CHARLES M. COATE, ESQ.
1221 SECOND ST., THIRD FLOOR
SANTA MONICA, CALIFORNIA 90401

INGRID A. LAFRANCHI
OFFICIAL REPORTER
C.S.R. NO. 9120

FOR DEFENDANT: GFT CIRCLE FILMS, ROAD RAGE FILMS, JANUS PRODUCTIONS, GFT GOING BACKFILM, ET AL.	HAMRICK & EVANS LLP BY: A. RAYMOND HAMRICK, III, ESQ. 10 UNIVERSAL CITY PLAZA, SUITE 2200 UNIVERSAL CITY, CALIFORNIA 91608
FOR DEFENDANT: GFT ENTERTAINMENT	WILLIAMS & KILKOWSKI BY: JAMES M. KILKOWSKI, ESQ. 1900 AVENUE OF THE STARS, 25TH FLOOR LOS ANGELES, CALIFORNIA 90067
FOR DEFENDANT: MICHEL GLOCKLER	KAMANSKI & STRELTZER LLP BY:-DAM L. STRELTZER, ESQ. 10940 WILSHIRE BLVD., SUITE 600 LOS ANGELES, CALIFORNIA 90024
FOR DEFENDANT: ADAM BENNECKE	PLG GENERAL COUNSEL, INC. BY: JAMES R. ZATOLOKIN, ESQ. 6701 CENTER DRIVE WEST, SUITE 710 LOS ANGELES, CALIFORNIA 90045
[1] CASE NUMBER:	BC316406
CASE NAME:	COMERICA BANK VS. HOWSAM, ET AL.
LOS ANGELES, CALIFORNIA	DECEMBER 15, 2004
DEPARTMENT 31	HON. ANDRIA K. RICHEY, JUDGE

REPORTER: INGRID A. LAFRANCHI, CSR NO. 9120

TIME: 8:57 A.M.

APPEARANCES: (AS HERETOFORE NOTED)

THE COURT: LET'S CALL NO. 3, COMERICA, BC316406.

MORNING.

MR. WACHTELL: MORNING, YOUR HONOR. MICHAEL WACHTELL, RONALD SITTLER, AND ROBERT ADDISON OF BUCHALTER, NEMER, FIELDS & YOUNGER ON BEHALF OF COMERICA BANK, YOUR HONOR.

THE COURT: MORNING.

MR. COATE: MORNING, YOUR HONOR. CHARLES COATE OF COSTA, ABRAMS & COATE APPEARING ON BEHALF OF SPECIALLY APPEARING DEFENDANTS GARY HOWSAM AND GREENLIGHT FILM AND TELEVISION, INC.

THE COURT: GOOD MORNING.

MR. HAMRICK: MORNING, YOUR HONOR. A. RAYMOND HAMRICK, III, APPEARING ON BEHALF OF DEFENDANTS GFT CIRCLE FILMS, ROAD RAGE FILMS, JANUS PRODUCTIONS, GFT GOING BACK-FILMS, GFT HERESY FILMS, GFT/REDWOOD KOTN FILMS, AND GFT/REDWOOD IGNITION FILMS.

THE COURT: I'LL HAVE TO GIVE YOU A NICKNAME.

MR. HAMRICK: AKA.

MR. KILKOWSKI: MORNING, YOUR HONOR. JAMES KILKOWSKI FOR SPECIALLY APPEARING DEFENDANT GFTE ENTERTAINMENT, INC.

THE COURT: GOOD MORNING.

[2] MR. STRELTZER: YOUR HONOR, ADAM STRELTZER ON BEHALF OF DEFENDANTS MICHEL GLOCKLER.

THE COURT: GOOD MORNING.

MR. ZATOLOKIN: MORNING, YOUR HONOR. JAMES ZATOLOKIN OF PLG GENERAL COUNSEL APPEARING ON BEHALF OF THE DEFENDANT ADAM BENNECKE.

THE COURT: GREAT. I THINK EVERYBODY IS HERE.

MR. COATE: YES, YOUR HONOR.

THE COURT: I WILL ASK YOU FOLKS WHEN YOU SPEAK, SINCE I DON'T THINK MY REPORTER KNOWS YOU ALL YET, JUST IDENTIFY YOURSELF ONE MORE TIME FOR THE RECORD SO SHE GETS THE RIGHT NAME.

I WOULD LIKE TO START, IF I CAN, WITH THE GFT ENTERTAINMENT MOTION TO QUASH. I'VE GOT SOME QUESTIONS ABOUT THAT. I TRIED TO LET YOU ALL KNOW WHAT MY QUESTIONS WERE IN THE TENTATIVE. IF WE COULD START WITH THAT, I WOULD APPRECIATE IT.

MAYBE BEFORE WE START WITH THAT LET ME ASK YOU: I DON'T KNOW IF YOU FOLKS HAVE HAD TIME TO TALK ABOUT THE COURT'S SUGGESTION

THAT WE GET SOME FURTHER BRIEFING ON THE ARBITRATION MOTION.

HAVE YOU GUYS TALKED ABOUT THAT THIS MORNING?

MR. HAMRICK: WE HAVE NOT HAD A CHANCE TO TALK ABOUT THAT, YOUR HONOR.

THE COURT: WELL, IT WOULD BE MY SUGGESTION THAT WE DO THAT AND ARGUE THAT MOTION ON THE 29TH, IF YOU GUYS CAN DO THAT.

MR. WACHTELL: YOUR HONOR, I REQUEST TO HAVE YOUR HONOR [3] PUT THAT DATE TO A DATE OTHER THAN THAT WEEK BETWEEN CHRISTMAS AND NEW YEAR'S. A LOT OF PEOPLE ARE ON VACATION.

THE COURT: IN THAT CASE, MAYBE WHAT WE WILL DO IS ARGUE IT TODAY AND YOU CAN SUBMIT FURTHER BRIEFING AND THE MATTER WILL BE SUBMITTED AT THAT TIME.

MR. HAMRICK: YOUR HONOR, I AM COMFORTABLE WITH THE 29TH. WHATEVER YOUR PREFERENCE IS.

THE COURT: COUNSEL IS NOT AVAILABLE. I DON'T WANT TO FORCE HIM TO BE HERE, ALTHOUGH I THOUGHT YOU WERE GOING TO BE HERE FOR THE –

MR. WACHTELL: WE WILL COVER –

MR. ADDISON: WE WERE GOING TO HAVE AN ASSOCIATE COVER THE DEMURRER HEARING OF MICHEL GLOCKLER PRESENTLY SET FOR THE

29TH. WITH REGARD TO THESE OTHER ISSUES BEFORE THE COURT, THE ATTORNEYS THAT NEED TO BE HERE FOR THAT ARE GOING TO BE OUT OF TOWN.

THE COURT: OKAY. LET'S ARGUE IT TODAY THEN, AND I WILL ASK THAT YOU FILE SUPPLEMENTAL BRIEFS ON THESE TWO ISSUES IN ADDITION AND THE MATTER WILL THEN BE SUBMITTED AS SOON AS THOSE SUPPLEMENTAL BRIEFS ARE GOING TO BE FILED. THEY WILL HAVE TO BE FILED SOON, BEFORE THE 29TH SO I CAN RULE ON THAT DAY.

MR. WACHTELL: NO PROBLEM.

MR. ADDISON: THE TWO ISSUES, IS THAT THE ARBITRATION AS WELL AS THE GFT ISSUE?

THE COURT: NO. NO. JUST THE ARBITRATION. ALL I TRIED TO SAY IN THE TENTATIVE IS THAT I THOUGHT FURTHER BRIEFING ON THE ARBITRATION ISSUE ON THE QUESTIONS I HAVE OUTLINED FOR YOU [4] WOULD BE VERY HELPFUL. BUT WE CAN ARGUE IT TODAY, THEN YOU CAN JUST FILE YOUR SUPPLEMENTAL BRIEFS. WHY DON'T WE SAY YOU WILL FILE THEM BY THE 27TH. COURTESY COPIES NEED TO BE UP HERE, PLEASE, BY NOON THAT DAY.

MR. HAMRICK: FILE IT CONCURRENTLY, YOUR HONOR?

THE COURT: PLEASE. THE PROBLEM IS IF YOU FILE IT DOWNSTAIRS, SOMETIMES IT DOESN'T GET UP HERE UNTIL THE NEXT DAY. I REALLY WANT TO MAKE SURE I'VE HAD TIME TO READ IT.

IN ADDITION TO THE DEMURRER, I THINK MS. GLOCKLER HAS SOME KIND OF MOTION FOR STAY OR SOMETHING BASED ON HER ASSUMPTION THAT THE MATTERS ARE GOING TO BE ARBITRATED, SO WE CAN RESOLVE IT ALL THAT DAY.

LET'S GO TO GFT. I FORGET WHICH COUNSEL IT IS.

MR. KILKOWSKI: YOUR HONOR, I AM OBVIOUSLY COUNSEL FOR GFTE, AND WE AGREE WITH YOU THAT THERE IS NO CONTINUATION HERE. AS OBVIOUS FROM THE PAPERS, GREENLIGHT FILM AND TELEVISION HAS 34 FILMS. IT HAS OTHER BUSINESSES. IT CONTINUES TO OPERATE TO THIS DAY. IT'S GOT A MOVIE IN PRODUCTION RIGHT NOW. IT HAS AN INVESTMENT IN A MOVIE THAT IS BEING DISTRIBUTED BY SONY RIGHT NOW. IT DID NOT GO AWAY.

IN THAT REGARD, IT DISTINGUISHES – THE FACTS ARE DISTINGUISHED FROM THE OTHER CASES, FOR EXAMPLE, THE CONDOMINIUM CASE IN WHICH DAY ONE THEY RECALL ONE NAME AND THE NEXT DAY ALL THE ASSETS AND ALL OF THE BUSINESS RELATIONSHIPS AND EVERYTHING ELSE APPEAR IN SOMEONE ELSE'S NAME.

IN ADDITION TO THE FACT THAT THERE IS NO CONTINUATION, WE WOULD ALSO LIKE TO EMPHASIZE THE FACT THAT THERE IS NO FOLLOW-THROUGH OF THE OWNERSHIP. THE OWNERSHIP OF [5] GFT IS PEACE ARCH WHICH IS A PUBLICLY-TRADED COMPANY IN CANADA. PEACE ARCH OWNS NOTHING OF GREENLIGHT. SO YOU HAVE A 100 PERCENT OWNER OF GFT ENTERTAINMENT WHO IS

MAKING A MOTION AND IT HAS NO OWNERSHIP OF THE SUPPOSED PREDECESSOR OF WHICH IT IS NOW THE SUPPOSED SUCCESSOR. AND WE THINK BOTH OF THOSE TWO THINGS ARE NECESSARY.

I GUESS JUST TO SUMMARIZE AT THIS POINT, I READ THE OPPOSITION PAPERS AGAIN, AND THERE IS ONE PARAGRAPH THAT SEEMS TO HIGHLIGHT THE POSITION AND THAT IS ON PAGE 8 STARTING AT LINE 4 THROUGH LINE 10. IT'S A JUST SIX-LINE PRESENTATION.

EVERYTHING IN IT IS WRONG. THEY START OUT BY SAYING THAT HOWSAM AND GREENLIGHT OBTAINED LOANS FROM COMERICA ON FALSE PRETENSES. THEY CITE 14 AND 15. ABSOLUTELY NO EVIDENCE THAT HOWSAM HAD ANYTHING TO DO WITH IT. ABSOLUTELY NO EVIDENCE THAT GREENLIGHT HAD ANYTHING TO DO WITH IT.

SECOND, IF THE COURT WERE TO ABSOLVE GFT OF LIABILITY FOR GREENLIGHT, COMERICA'S REMEDY AGAINST GREENLIGHT AND HOWSAM WOULD BE EFFECTIVELY DESTROYED. HOWSAM IS THERE AND GREENLIGHT IS THERE. IT'S NOT TRUE.

FINALLY, IT SAYS GFT IS OBTAINING THE ECONOMIC BENEFIT OF THE VERY FILMS GREENLIGHT PRODUCED. NOT TRUE. GREENLIGHT STILL OWNS THE FILMS THAT THEY ARE COMPLAINING ABOUT. THERE HAS BEEN NO TRANSFER OF ANY ECONOMIC BENEFIT FROM GREENLIGHT TO GFT. SO NO EVIDENCE OF FRAUD. NO EVIDENCE OF TRANSFER OF ALL OF THE ASSETS. NO EVIDENCE OF ECONOMIC BENEFIT. IT'S THEIR BURDEN ON

THIS MOTION TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT ALL OF THOSE THINGS ARE TRUE, AT LEAST FOR PURPOSES OF THE JURISDICTIONAL MOTION, AND [6] THEY FAILED TO DO SO.

THANK YOU.

THE COURT: THANK YOU.

PLAINTIFF.

MR. ADDISON: YOUR HONOR, MAY I BE HEARD?

THE COURT: YES.

MR. ADDISON: ROBERT ADDISON ON BEHALF OF COMERICA BANK.

YOUR HONOR, THERE ARE TWO BASES THAT WE HAVE ALLEGED FOR THE SUCCESSOR – I MEAN, FOR THE SUCCESSOR LIABILITY OF GFT. ONE IS THE CONTINUITY EXCEPTION TO THE RULE, AND THE OTHER IS THE FRAUD EXCEPTION. THE CONTINUITY EXCEPTION HAS TWO REQUIREMENTS. NO ADEQUATE CONSIDERATION GIVEN FOR THE PREDECESSOR CORPORATION'S ASSETS. ONE OR MORE PERSONS WERE OFFICERS, DIRECTORS, OR STOCKHOLDERS OF BOTH COMPANIES. THAT IS IN THE *MCCLELLAN* CASE.

GARY HOWSAM IS AN OFFICER OF EVERY COMPANY AT ISSUE IN THIS CASE. AND HE – AS STATED IN HIS OWN DECLARATION, PEACE ARCH ACQUIRED GFT WHICH ACQUIRED FROM GREENLIGHT 100 PERCENT OF THE STOCK OF EACH OF THE FIVE

PRODUCTION COMPANIES THAT WERE IN THE PROCESS OF MAKING MOVIES FOR ONE DOLLAR.

YOUR HONOR, ALSO, BOTH COMPANIES OPERATED OUT OF THE SAME ADDRESS. GFT'S WEB SITE HAD LISTED ALL OF GREENLIGHT'S FILMS INCLUDING THE FILMS AT ISSUE IN THIS CASE. AND IMPORTANTLY, GFT WAS FORMED AFTER THE DISCOVERY OF THE FRAUD IN THIS CASE.

AND, YOUR HONOR, WE SUBMIT THAT THERE IS REALLY NO DIFFERENCE IN HAVING A PREDECESSOR COMPANY THAT A WRONGDOER WRAPS UP AND THEN FORMS A NEW COMPANY TO CONTINUE THE BUSINESS [7] AND KEEPING THE PREDECESSOR COMPANY IN OPERATION BUT REALLY DOING THE LION'S SHARE OF ALL THIS NEW BUSINESS WITH A NEW COMPANY AS PART OF A SHAM TO AVOID LIABILITY.

WHEN GARY HOWSAM REALIZED HE WAS FACING UP TO $20 MILLION IN EXPOSURE, HE MOVED QUICKLY TO FORM A NEW COMPANY, JOIN UP WITH ANOTHER PRODUCTION COMPANY, AND TRY AND BUILD AS BIG A SHIELD AS HE COULD BETWEEN HIMSELF AND THE LIABILITY TO COMERICA.

THE COURT: I GUESS THAT MEANS THAT YOU ARE DISCOUNTING THE REPLY DECLARATIONS COMPLETELY. I MEAN, I GUESS I AM HAVING TROUBLE UNDERSTANDING WHERE THE EVIDENCE IS FOR YOUR POSITION AS TO GFT. I AM HAVING TROUBLE.

MR. ADDISON: THE EVIDENCE WE HAVE IS HOWSAM IS AN OFFICER OF ALL THE COMPANIES,

THAT HE WAS A PRESIDENT OF GREENLIGHT, THAT THE COMPANIES OPERATE OUT OF THE SAME ADDRESS, THAT ON GFT'S WEB SITE THEY WERE LISTING GREENLIGHT'S FILMS. IF ITS TRULY A NEW BUSINESS, WHY ARE GREENLIGHT'S FILMS LISTED ON GFT'S WEB SITE AS COMPLETED PRODUCTIONS?

THE COURT: HOPEFULLY, THEY WILL TELL US.

MR. ADDISON: AND, YOUR HONOR, AT A MINIMUM WE SHOULD BE ENTITLED TO SOME DISCOVERY AS TO THE VERY DETAILS OF THE TRANSACTIONS OF THE FORMATION OF THE NEW COMPANY, WHAT ASSETS WERE TRANSFERRED, AND ESPECIALLY THE ALLEGATIONS SET FORTH IN THE DECLARATIONS OF WHICH WE HAD NO OPPORTUNITY TO CONDUCT DISCOVERY ON.

THE COURT: TELL ME WHAT DISCOVERY PRECISELY YOU WOULD SEEK.

MR. ADDISON: WE WOULD SEEK SOME DISCOVERY OF THE ASSETS [8] OF GREENLIGHT AND AN ACCOUNTING OF THEM AS THEY EXISTED BEFORE THE CREATION OF GFT AND AFTER.

THE COURT: WHAT DO YOU MEAN "AN ACCOUNTING"?

MR. ADDISON: WELL, WE WOULD LIKE TO SEE HOW MUCH OF THE ASSETS OF GREENLIGHT WERE TRANSFERRED TO GFT, IF ANY OF THEM WERE DISSIPATED OR, YOU KNOW, IF GREENLIGHT LOST A SIGNIFICANT AMOUNT OF ASSETS AROUND THE SAME TIME AS THE FORMATION OF GFT WHICH WOULD SUPPORT OUR CLAIM THAT GARY

HOWSAM WAS ESSENTIALLY TRYING TO ELIMINATE OR BREAK THAT LINK BETWEEN HIMSELF AND HIS NEW COMPANY AND THE LIABILITY OF HIS OLD COMPANY THAT HE CREATED.

MR. WACHTELL: MICHAEL WACHTELL, YOUR HONOR.

THE ISSUE IS GOING TO BE WHETHER OR NOT THE TRANSFER OF THE ASSETS CONSTITUTED A FRAUDULENT CONVEYANCE IN AN EFFORT TO PRECLUDE CREDITORS OF THESE ENTITIES FROM COLLECTING –

THE COURT: WELL, THE ISSUE FOR THIS MOTION DOESN'T HAVE TO BE THAT BROAD, DOES IT? I MEAN, THE DISCOVERY IF YOU GET ANY FOR THIS MOTION HAS GOT TO BE QUICK AND LIMITED. RIGHT? WE AGREE ON THAT?

MR. WACHTELL: THE LAW ALLOWS DISCOVERY AS TO JURISDICTIONAL ISSUES ONLY.

THE COURT: RIGHT.

OKAY. ANY RESPONSE FROM DEFENSE?

MR. COATE: YES.

THE COURT: MOVING PARTY, PLEASE.

MR. KILKOWSKI: YOUR HONOR, MR. ADDISON JUST THROWS TERMS AROUND. HE SAYS HOWSAM IS A NEW COMPANY. GFT IS NOT HOWSAM'S NEW COMPANY. IT'S OWNED BY A PUBLIC COMPANY IN CANADA, [9] PEACE ARCH. PEACE ARCH HAS LITERALLY HUNDREDS OF SHAREHOLDERS, SO IT IS NOT HOWSAM'S NEW COMPANY.

THEY KEEP, AS I SAID IN MY PAPERS, STAMPING THEIR FEET AND REPEATING THE ISSUE. IT'S NOT HIS COMPANY.

THEY SAID THAT THE LION'S SHARE OF BUSINESS WAS TRANSFERRED TO THE NEW COMPANY. THERE ARE 34 FILMS IN THE OLD COMPANY. THERE ARE FIVE FILMS IN THE NEW COMPANY, ALL OF WHICH ARE UNDER WATER. THEY HAVEN'T MADE A PROFIT. HOW IS FIVE THE LION'S SHARE OF 39? IT ISN'T.

AND IN ADDITION TO THE FILM BUSINESS, GREENLIGHT HAS OTHER BUSINESSES. THEY HAVE A FINANCING BUSINESS. THEY HAVE A DISTRIBUTION BUSINESS. THEY ARE IN ACTIVE BUSINESS TODAY. AND THERE IS NO SHOWING OF A TRANSFER OF ANY ASSETS OF ANY VALUE.

AND THE REASON, OF COURSE, YOUR HONOR, THAT WE BROUGHT THIS TO YOUR ATTENTION, THE FIVE FILMS THAT WERE, IN FACT, TRANSFERRED, IS BECAUSE WE THOUGHT IT WAS NECESSARY IN TERMS OF MEETING OUR OBLIGATION OF CANADA TO THE COURT. BUT THOSE FILMS WEREN'T FINANCED WITH COMERICA'S MONEY. THOSE FILMS DIDN'T HAVE COMERICA LOANS. THEY DIDN'T HAVE ANYTHING TO DO WITH COMERICA.

AND ONE THING THAT HASN'T BEEN MENTIONED, WHICH WE MENTIONED IN OUR PAPERS A NUMBER OF TIMES, IS THAT GFTE WASN'T EVEN FORMED AT THE TIME ALL OF THIS STUFF TOOK PLACE.

SO I GUESS THE LAST THING I WOULD LIKE TO SAY, YOUR HONOR, IS THAT IF THEY WANT TO SUE FOR FRAUDULENT TRANSFER WHEN THEY'VE GOT SOME FACTS, LET THEM DO IT. BUT NOW IS NOT THE TIME.

[10] THE LAST THING IS WITH RESPECT TO THE FRAUD ISSUE, PERHAPS IN MY OPINION THE MOST TELLING FACTS WHICH WE OFFERED YOU IN THE DECLARATION ARE THESE: 28 FILMS HAVE BEEN FINANCED BY GREENLIGHT. TEN OF THEM WITH COMERICA, 18 WITH OTHER LENDERS. NO PROBLEMS WHATSOEVER. SIX FILMS WHICH ARE THE FILMS AT ISSUE IN THIS CASE WERE FINANCED BY COMERICA, AND SOME OF THE CONTRACTS WHICH CAME IN CAME IN THROUGH US. AND SOME OF THEM CAME IN THROUGH THE FOREIGN SALES AGENT. THERE ARE NO PROBLEMS WHATSOEVER WITH ANYTHING THAT CAME IN THROUGH US. THE ONLY PROBLEMS THAT EXIST ARE CONTRACTS THAT CAME IN THROUGH THE FOREIGN SALES AGENT.

THERE IS A CONCLUSION THERE WHICH I DON'T WANT TO DRAW FOR PURPOSES OF THEIR OTHER CASE, BUT IT SEEMS TO ME THAT THE EVIDENCE IS PERFECTLY CLEAR THAT TO THE EXTENT THESE CONTRACTS ARE PROBLEMATIC THEY ORIGINATED OUT OF FOREIGN SALES AGENTS, NOT US. THEY PUT US IN HOT WATER. THEIR OWN DECLARATIONS SAY THAT HOWSAM SAID, THIS PUTS US IN HOT WATER." WHY? BECAUSE THE FULL BUDGETS OF THE FILMS WERE FINANCED, AND ALL OF A SUDDEN LARGE PIECES OF THEIR FOREIGN DISTRIBUTION SALES DISAPPEAR WHICH MEANS THAT THE

PRODUCTION COMPANIES STILL HAVE TO PAY. THERE HASN'T BEEN ANY RELIEF OF LIABILITY HERE.

HOWSAM AND THE COMPANIES, ALL OF WHICH ARE SEPARATE AND INDEPENDENT AND ALL OF WHICH WERE THE BORROWERS, WERE ALL SPE'S AT COMERICA'S INSISTENCE, STILL HAVE TO PAY US OFF. IT WOULD BE STUPID FOR US TO MAKE MOVIES WITH FORGED AGREEMENTS AND THEN STILL HAVE TO PAY THEM BACK. IT DOESN'T MAKE ANY SENSE.

[11] ONCE AGAIN, TO SUMMARIZE, NO EVIDENCE OF FRAUD. NO EVIDENCE OF ANY FRAUDULENT TRANSFER. AND THEY DON'T NEED DISCOVERY BECAUSE NO DISCOVERY IN THE WORLD IS GOING TO CHANGE THE FACT THAT PEACE ARCH OWNS 100 PERCENT OF GFT AND IT OWNS NOTHING OF GREENLIGHT.

THE COURT: DO YOU HAVE ANY RESPONSE TO THE ISSUE OF THE WEB SITES?

MR. KILKOWSKI: YES, YOUR HONOR.

THOSE FILMS WERE LISTED ON THAT WEB SITE AS GREENLIGHT FILMS. THEY ARE NOT ON GFT FILMS. AND I HAVE THE UNDERSTANDING THAT IT'S KIND OF A BRANDING PROCESS. YOU WANT TO MAKE YOURSELF LOOK LIKE A COMPANY THAT HAS MADE LOTS OF MOVIES AND AS A RESULT YOU HAVE MOVIES FOR GFTE. AND THERE IS AN ASSOCIATION BETWEEN GFTE AND GREENLIGHT BECAUSE THE MOVIES THAT GREENLIGHT – SORRY – THAT GFTE MADE HAD ORIGINALLY BEEN MADE

THROUGH THE PRINCIPAL PHOTOGRAPHY PHASE BY GREENLIGHT AND THEY WERE TRANSFERRED OVER AND SO THE MOVIES THAT GFTE MADE HAD NOTHING TO DO WITH THE MOVIES THAT GREENLIGHT MADE.

THE COURT: IF THAT'S THE, CASE, IT'S PERPLEXING THAT THEY WOULD BE REMOVED FROM THE WEB SITE IT DOESN'T REALLY MAKE ANY SENSE.

MR. KILKOWSKI: I THINK IT'S JUST A QUESTION OF SINCE IT CAME UP IN THIS CASE, IT BRINGS CLARITY TO THE ORGANIZATION BUT BY THE WAY, YOUR HONOR, THAT WEB SITE INFORMATION ISN'T ADMISSIBLE, BY THE WAY.

THE COURT: I READ YOUR OBJECTIONS.

MR. KILKOWSKI: THERE IS NO FOUNDATION FOR IT. WE DON'T [12] KNOW WHO WROTE IT.

THE COURT: OKAY.

MR. KILKOWSKI: IT'S JUST A VERY SLIM READ BASED ON THE SUBSTANTIAL DEMONSTRATION OF THE NO-FRAUD POINT AND THE NO-CONTINUATION POINT.

THE COURT: ANYTHING FURTHER FROM PLAINTIFF?

MR. ADDISON: TWO QUICK POINTS, YOUR HONOR.

IN RESPONSE TO GFT'S CLAIM THAT GFT IS NOT HOWSAM'S NEW COMPANY, THAT IT'S OWNED BY

PEACE ARCH, HOWSAM IS A CEO OF PEACE ARCH AND, YOU KNOW, IT IS HIS NEW COMPANY.

THE OTHER ISSUE IS WITH REGARD TO DISCOVERY NOT ONLY ON FRAUDULENT CONVEYANCE, BUT WE ALSO WOULD CONDUCT DISCOVERY ON THE CONTINUITY. YOU KNOW, GFT STATES THAT THERE WERE – YOU KNOW, THERE ARE STILL A SIGNIFICANT NUMBER OF MOVIES BEING PRODUCED BY GREENLIGHT. WE ARE UNAWARE OF THAT. COUNSEL DID NOT EXPLAIN THAT TO ME ON THE PHONE WHEN I HAD A CONVERSATION WITH HIM. AND WE WOULD BE ENTITLED TO DISCOVERY TO DETERMINE HOW MUCH OF GREENLIGHT'S OLD BUSINESS IS NOW BEING DONE BY GFT.

THE COURT: OKAY. THAT ONE WILL BE SUBMITTED.

LET'S TURN TO THE PETITION TO COMPEL ARBITRATION AND I WILL HEAR FROM MOVING PARTY FIRST.

MR. HAMRICK: YES, YOUR HONOR.

I HAVE READ THE COURT'S TENTATIVE, AND IT SEEMS THAT THE COURT IS CONVINCED OR DECIDED THAT THE FRAUD ISSUE IS NOT GOING TO BE A STUMBLING BLOCK TO THE MOTION.

THE COURT: WE SHOULDN'T WASTE ANY TIME ON THAT.

MR. HAMRICK: MOVING TO THE KEY ISSUES, I THINK THE

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[21] ARGUMENT ON YOUR OBJECTIONS, FEEL FREE.

MR. COATE: WELL, YOUR HONOR, IT'S CLEAR THAT THERE IS NO CONTRACTUAL PRIVITY BETWEEN SPECIALLY APPEARING DEFENDANTS AND THE PLAINTIFFS IN THIS CASE. IT'S ALSO CLEAR FROM THE DECLARATION OF MS. CARPENTER THAT THE BANK REQUIRED SPE'S TO BE SET UP FOR EACH OF THESE FILMS. THIS IS NOT A FRAUDULENT INCORPORATION IN THE INCEPTION WHICH IS TYPICALLY WHAT PEOPLE CITE TO WHEN TRYING TO APPLY THE ALTER EGO DOCTRINE.

THESE CORPORATIONS WERE SET UP AS SINGLE-PURPOSE ENTITIES BECAUSE THE BANK REQUIRED THAT IN ORDER TO EFFECT THE LOANS. AND THIS IS DONE FOR A NUMBER OF REASONS.

ONE, YOU WANT TO HAVE AN ENTITY THAT CONTROLS THE RIGHTS TO THE FILM AND MAKES IT EASY TO CONVEY, MAKES IT EASY FOR THE BANK TO SET UP ACCOUNTS ON A PER-FILM BASIS, AND ALSO IN THE EVENT OF A SHORTFALL TO FORECLOSE ON THAT PARTY'S FILMS. THE BANK HAS NOT TAKEN THOSE STEPS. THEY HAVE FORECLOSURE RIGHTS ON THESE FILMS. THEY HAVEN'T AVAILED THEMSELVES OF IT. THAT'S A DIFFERENT ISSUE.

SO IF THE BANK IS REQUIRING IT, HOW CAN THEY TURN AROUND AND THEN ARGUE WHY THIS WAS FRAUD IN THE INCEPTION? THESE COMPANIES, THEY WERE UNDER CAPITALIZED. THEY SET OUT FROM THE START TO STEAL OUR MONEY. IT'S CLEARLY NOT THE CASE. IT'S JUST THE WAY

BUSINESS IS DONE IN THIS INDUSTRY. THEY DO IT ON ALL THEIR LOANS. THAT IS JUST STANDARD OPERATING PROCEDURE. THERE IS NO FRAUD IN SETTING UP SINGLE-PURPOSE ENTITIES TO PRODUCE MOTION PICTURES.

THERE IS ALSO NO QUESTION HERE, YOUR HONOR, THESE WERE FOREIGN FILMS. THESE ARE CANADIAN OR CANADIAN U.K. [22] CO-PRODUCTIONS. THEY WERE PRODUCED IN CANADA OR THEY WERE PRODUCED IN CANADA AND THE UNITED KINGDOM, OTHER COUNTRIES. THEY WERE MADE BY CANADIANS PRIMARILY. THIS IS – THIS CASE HERE THERE WAS A LOT OF TRANSACTING GOING ON OUTSIDE OF THE UNITED STATES. YES, LOANS WERE MADE, BUT THEY WERE ONLY PART OF THE LOANS MADE FOR THESE PICTURES IN MANY CASES.

SO AS FAR AS APPLYING THE ALTER EGO DOCTRINE, WE CITED THE *SONORA MINING* CASE. IN THAT CASE IT'S NOT ENOUGH SIMPLY TO ALLEGE AN ALTER EGO RELATIONSHIP. YOU'VE GOT TO COME FORWARD WITH EVIDENCE, AND THE BURDEN OF PROOF IS ON THEM. THE DECLARATIONS ARE REPLETE WITH HEARSAY.

THE TWO DISTRIBUTORS AMONG – I GUESS THERE ARE FOUR-INCH BINDERS THAT THEY DIDN'T COME FORWARD WITH, WITH ALL OF THIS SO-CALLED STATEMENTS THEY ARE RELYING ON THAT SAY, "IT APPEARS IT'S NOT MY SIGNATURE." NO ONE IS SAYING, "I KNOW GARY HOWSAM FORGED THIS DOCUMENT. I KNOW GREENLIGHT FILM AND TELEVISION, INC. PROVIDED THIS DOCUMENT."

THERE IS NO CAUSAL LINK IN THOSE DECLARATIONS BETWEEN THESE DEFENDANTS WHO HAVE NO CONTRACTUAL PRIVITY WHO ARE CANADIAN NATIONALS OR A CANADIAN CORPORATION, NO PRIVITY WITH THE DEFENDANTS, AND IT'S THEIR BURDEN TO COME FORWARD WITH THAT. THE *SONORA MINING* CASE IS CLEAR YOU CAN'T JUST ALLEGE IT.

SIMILARLY, THERE IS NO EVIDENCE OF FRAUD BY THESE DEFENDANTS. AS MR. KILKOWSKI POINTED OUT, WHAT IS BEFORE THE COURT ARE FACTS AND CIRCUMSTANCES INDICATING THAT A SALES AGENT MIGHT HAVE PROVIDED, THESE DOCUMENTS. WE DON'T KNOW. BUT THERE IS NOTHING IN THESE DECLARATIONS THAT INDICATES MY CLIENTS IN ANY WAY PARTICIPATED IN IT.

[23] NOW, THIS ALSO LEADS US TO ANOTHER ISSUE, YOUR HONOR. I MEAN, AT THIS POINT WE ARE STILL CONTESTING JURISDICTION AND I UNDERSTAND YOUR HONOR'S TENTATIVE, AND WHETHER OR NOT YOU WAIVER FROM THAT TENTATIVE WE WILL, OF COURSE, ADDRESS IT. BUT THE PLAINTIFF'S FIRM BEFORE THIS CASE WAS FILED WENT TO CANADA, REVIEWED ALL OF MY CLIENT'S FILES, AND THIS WAS DONE BECAUSE THEY SAID, "WE HAVE TO FIND OUT WHAT HAPPENED HERE. WE UNDERSTAND YOU HAVE CLAIMS AGAINST THE SALES AGENT, BUT SO DO WE. SO LET US PROSECUTE THESE CLAIMS ON OUR BEHALF BECAUSE IT WILL REDUCE YOUR INDEBTEDNESS AND HOPEFULLY IT WILL LEAD US TO GETTING PAID."

SO WE COOPERATED WITH THE BANK, WITH THE BANK'S LAWYERS. THESE GENTLEMEN WERE IN MY CLIENT'S OFFICES IN CANADA. THEY FILED ALL – I MEAN, THEY COPIED ALL THE RECORDS IN CANADA THAT WERE PROVIDED VOLUNTARILY UNDER FALSE PRETENSES. I BELIEVE AT THAT TIME THEY THOUGHT THAT THESE LAWYERS WERE ACTING IN THEIR JOINT INTEREST. IT WAS IN THE PRODUCER'S INTEREST TO SEE THAT THESE MONIES WERE REPAID BECAUSE IT WOULD REDUCE THE LOAN INDEBTEDNESS.

SO IF THE CASE GOES FORWARD AND JURISDICTION, THAT ISSUE IS BEHIND US, WE DO ANTICIPATE FILING A MOTION TO RECUSE COUNSEL. I UNDERSTAND TYPICALLY THAT THE COURT WILL LOOK AT THE FORUM NON-CONVENIENCE MOTION AS AN ADJUNCT TO THE JURISDICTIONAL MOTION. BUT, AGAIN, THESE ARE CANADIAN MOVIES. THEY WERE PRODUCED IN CANADA BY CANADIANS. ALL OF THE RECORDS THAT THEY ARE SEEKING ARE IN TORONTO AND/OR BRITISH COLUMBIA. THIS IS REALLY A CANADIAN CASE, YOUR HONOR.

THE COURT: DO YOU HAVE AGREEMENTS FROM ALL THE FOLKS IN [24] THIS CASE THAT THEY WILL BE SUBJECT TO JURISDICTION BY SOMEBODY IN CANADA?

MR. COATE: YES, YOUR HONOR.

THE COURT: IS THAT IN WRITING SOMEWHERE?

MR. COATE: MY UNDERSTANDING, YOUR HONOR, AND I GUESS YOU WILL HAVE TO HEAR

FROM CO-DEFENDANTS, IS THAT WE PREFER IF THE CASE GOES FORWARD TO DO IT IN ARBITRATION TO THE EXTENT THAT THE PARTIES ARE SUBJECT – THE PRINCIPAL PARTIES ARE SUBJECT TO ARBITRATION CLAUSES, AND WE HAVE CONSPIRACY CLAIMS. BUT I DON'T WANT TO SPEAK OUT OF TURN FOR THE OTHER DEFENDANTS.

THE COURT: MY QUESTION IS: HAS EVERYBODY AGREED TO THE JURISDICTION OF SOME CANADIAN PROVINCE OR ENTITY? THE MOTION DOESN'T EVEN TELL ME WHICH CANADIAN PROVINCE THIS SHOULD BE IN AND THEY HAVE VERY DIFFERENT LAWS. THAT IS ONE OF THE OTHER PROBLEMS I'VE GOT WITH THE FORUM NON-MOTION.

NOBODY IS TELLING ME WHAT FORUM WE WOULD USE. I HAVE NO DECLARATIONS FROM ANY CANADIAN COUNSEL THAT KNOW ANYTHING ABOUT THE PROVINCE YOU WOULD USE. THAT IS A PROBLEM FOR ME. I DON'T HAVE ANYTHING FROM ANYBODY SAYING, "WE WILL ALL AGREE TO JURISDICTION ANYWHERE." LET'S LEAVE THAT ISSUE ASIDE. WE ARE NOT GOING TO ADDRESS IT NOW. EVERYBODY HAD TIME TO.

ANYTHING ELSE ON THAT?

MR. COATE: YOUR HONOR, THE ONLY THING THAT I WOULD ADD IS GIVEN THE NATURE OF A JURISDICTIONAL CHALLENGE, IN THE EVENT THE COURT STANDS ON ITS TENTATIVE, WE WOULD REQUEST LEAVE OF COURT UNDER C.C.P. 41810(C) FOR AN ADDITIONAL 20 DAYS TO PROCEED WITH A WRIT WITH THE INTERVENING HOLIDAYS

AND I [25] HAVE VACATION PLANS OVER THE HOLIDAYS AND SO DOES MY CLIENT.

THE COURT: I HEAR YOU. THAT WOULD MAKE SENSE.

MR. COATE: WE WOULD APPRECIATE THAT.

THE COURT: OKAY. PLAINTIFF.

MR. ADDISON: ROBERT ADDISON.

YOUR HONOR, GARY HOWSAM CAME TO CALIFORNIA SEEKING LOANS TO PRODUCE FILMS FOR HIS PRODUCTION COMPANY GREENLIGHT FILM AND TELEVISION, AND HE SOUGHT OUT A CALIFORNIA BANK, COMERICA BANK, AND OBTAINED LOANS FROM THAT BANK. HE WAS HERE PERSONALLY. HE SIGNED THE LOAN DOCUMENTS.

MR. HOWSAM'S COUNSEL HAS ACCURATELY STATED THAT THE FORMATION OF THESE SPE'S WAS STANDARD OPERATING PROCEDURE. IT'S BASICALLY AN ACKNOWLEDGMENT THAT IT'S A FORMALITY. IT'S PAPERWORK TO MAINTAIN THE EASE OF DOCUMENTING THE LOANS, WHO THE MONEY IS GOING TO GO TO, SETTING UP ACCOUNTS, ET CETERA.

I SHOULD ALSO MENTION THAT UNDER THE LOAN DOCUMENTS MOST OF THE FILMS WERE CROSS-COLLATERALIZED WITH EACH OTHER. SO THE LICENSE FEES COMING IN OFF "KEVIN OF THE NORTH" COULD BE APPLIED TO PAY OFF "THE CIRCLE" IF "KEVIN OF THE NORTH" GOT PAID OFF.

SO, YOU KNOW, NEITHER THE BANK NOR THE PRODUCER REALLY ACKNOWLEDGED THE SEPARATENESS OF THE SPE'S. THEY WERE BASICALLY – IT'S GARY HOWSAM, MOVIE PRODUCER, I NEED LOANS TO PRODUCE FILMS. HE IS HERE IN CALIFORNIA OBTAINING THOSE LOANS.

YOUR HONOR, IF WE HAVE TO PROVE OUR ENTIRE FRAUD CASE TO OBTAIN JURISDICTION AS HOWSAM'S COUNSEL SUGGESTS, THEN QUITE SIMPLY WE WOULD NEED MORE TIME AND WE WOULD NEED [26] OPPORTUNITY TO CONDUCT DISCOVERY ON THE ISSUE OF GARY HOWSAM'S FRAUD. THIS IS A HUGE CASE. IT'S NOT SOMETHING THAT COULD BE DONE WITHIN ONE MONTH.

WE HAVE SUBMITTED EVIDENCE OF FRAUD. WE HAVE PAYMENTS GOING TO THE SALES AGENT'S WIFE OUT OF GARY HOWSAM'S COMPANY'S BANK ACCOUNTS. THE EXPLANATION FOR THOSE PAYMENTS HAS BEEN DIFFERENT AT DIFFERENT TIMES, AND THE STORY THAT'S PRESENTED IN THE DECLARATIONS BY SOME TORONTO RESIDENT WHO CLAIMS TO BE SUPERVISING THE PRODUCTION ACCOUNTING, WE DON'T KNOW WHERE SHE IS FROM OR WHAT COMPANY SHE WORKS FOR OR WHAT HER CAPACITY WAS OR WHAT HER AUTHORITY WAS, BUT HER EXPLANATION IS DIFFERENT THAN THE EXPLANATIONS WE OBTAINED FROM HAREL GOLDSTEIN'S WIFE AND FROM GARY HOWSAM HIMSELF WHEN MR. SITTLER AND I WERE IN TORONTO MEETING WITH HIM.

AND ADDRESSING THAT TRIP ALSO, MR. SITTLER AND I DID GO TO CANADA AND DID MEET WITH GARY HOWSAM AND DID REVIEW SOME DOCUMENTS. UNDER THE LOAN AGREEMENTS THE PRODUCER IS OBLIGATED TO OPEN THE PRODUCTION FILES TO THE BANK FOR REVIEW. WE MADE A DEMAND TO LOOK AT THOSE FILES, AND WE WENT UP LOOKING FOR SPECIFIC ITEMS AND WE COPIED SOME OF THOSE FILES.

THE COURT: LET'S NOT TALK ABOUT POTENTIAL CONFLICT NOW.

MR. ADDISON: OKAY. THAT'S ALL, YOUR HONOR. WE FEEL THAT OUR PAPERS EXPLAIN THE ARGUMENT SUFFICIENTLY.

THE COURT: I THINK I WILL TAKE THEM ALL UNDER SUBMISSION. I THINK BASED ON SOME OF THE THINGS YOU FOLKS HAVE SAID TO ME, WE SHOULD PROBABLY CONTINUE THE CMC. I AM GOING TO ASK THAT YOU PEOPLE MEET AND CONFER, AND I WILL ASK PLAINTIFF'S COUNSEL TO INITIATE SUCH A MEET AND CONFER AND SEE

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

DEPARTMENT 31 HON. ANDRIA K. RICHEY, JUDGE

COMERICA BANK, A MICHIGAN BANKING CORPORATION, PLAINTIFF, VS. GARY HOWSAM, AN INDIVIDUAL, ET AL., DEFENDANTS.	)	SUPERIOR COURT NO. BC316406 REPORTER'S CERTIFICATE

I, INGRID A. LAFRANCHI, OFFICIAL COURT REPORTER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT THE FOREGOING PAGE 1 THROUGH 29, INCLUSIVE, COMPRISE A FULL, TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS HELD IN THE ABOVE-ENTITLED MATTER ON WEDNESDAY, DECEMBER 15, 2004.

DATED THIS 15TH DAY OF DECEMBER 2004

/s/ Ingrid A. Lafranchi
INGRID A. LAFRANCHI, CSR. NO. 9120
OFFICIAL REPORTER

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

COMERICA BANK, a Michigan Banking Corporation,

Plaintiff,

vs.

GARY HOWSAM, an individual; GFT ENTERTAINMENT, INC., an Ontario corporation, also known as GFTE, INC., and successor to GREENLIGHT FILM AND TELEVISION, INC. D/B/A GFT ENTERTAINMENT, an Ontario Corporation; GFT CIRCLE FILMS, INC., an Ontario Corporation; ROAD RAGE FILMS, INC., a Corporation of unknown origin; JANUS PRODUCTIONS, INC., a Quebec Corporation; GFT GOING BACK FILMS, INC.,

Case No.: BC 316406

[The Honorable Andria K. Richey]

DECLARATION OF GARY HOWSAM IN SUPPORT OF DEFENDANTS' MOTIONS TO DISMISS COMPLAINT FOR LACK OF PERSONAL JURISDICTION AND/OR TO DISMISS OR STAY ACTION ON FORUM NON CONVENIENS GROUNDS

[Complaint filed: June 1, 2004]

Date: November 17, 2004
Time: 8:30 a.m.
Dept.: 31

an Ontario Corporation; GFT/ REDWOOD KOTN FILMS, INC., a British Columbia Corporation; GFT/REDWOOD IGNITION FILMS, INC., a British Columbia Corporation; ADAM BENECKE, an individual; MICHEL GLOCKLER, an individual; and DOES 1 through 100, inclusive, Defendants.	Discovery Cut-off: None Motion Cut-off: None Trial Date: None (Filed Oct. 27, 2004)

I, GARY HOWSAM, hereby declare as follows:

1. I am a named Defendant in this matter and have personal knowledge of all matters stated herein. If called upon to testify to the matters set forth herein, I could and would do so competently. I make this declaration solely in connection with the instant Motions and make no general appearance in this action.

2. I am an individual over 18 years of age and am a citizen of the Province of Ontario, Canada residing in Toronto, Canada. I am also the President of Greenlight Film & Television Inc. ("GFTI") which is a corporation existing under the laws of Ontario, Canada which maintains its principal place of business at 124 Merton Street, Suite 407, Toronto, Ontario M4S 2Z2.

3 GFT is not now or has never been qualified to do business in the State of California.

4. None of GFTI's officers or directors, including myself, reside or are domiciled in the State of California.

5. GFTI has no employees, residing or domiciled in California.

6. GFTI has no branch office or comparable facilities in California, and has no telephone listings or mailing addresses in California.

7. Neither GFTI nor myself maintain any bank accounts or other tangible personal or real property in the State of California.

8. GFTI does not direct any of its advertising specifically toward California residents nor does it advertise in publications that are directed primarily toward California residents.

9. No meetings of GFTI's board of directors or shareholders have been held in California; none of its officers or directors have attended business conferences in such capacities within the State of California.

10. At no time have I individually or GFTI ever entered into a written agreement with Plaintiff. Nor have I individually ever entered into a written agreement with Plaintiff.

11. Further, it would be unreasonable to require Defendants GFTI and myself to defend this action in courts within California for the following reasons:

a. It would be unduly burdensome to require me to defend this action in the State of California as neither GFTI or myself have undertaken steps to purposefully avail ourselves of the jurisdiction of the State of California;

b. A proper alternative forum for this dispute readily exists in Ontario, Canada;

c. Ontario, Canada will be the most efficient forum to resolve this dispute as witnesses concerning the alleged obligations to Plaintiff are within the jurisdiction of Ontario, Canada; and,

d. California has little interest in the dispute involving the alleged non-payment of film distribution obligations between a Michigan Plaintiff and other Canadian Defendants.

12. The following are names and addresses of all person known to be percipient witnesses to any of the matters raised in the pleadings in this action and the matters upon which they are expected to testify:

a. I reside in Toronto, Ontario, Canada and will testify to the matters set forth herein on my own behalf on behalf of GFTI;

b. Greenlight Film & Television Inc. is a Toronto, Ontario, Canada Corporation and it expected to testify to the matters to which it is a percipient witness;

c. Plaintiff is a Corporation existing under the laws of the State of Michigan. It is unknown what Plaintiff will testify to.

13. Further, the interests of justice and the convenience of the parties and witnesses would be served by transferring this action to Ontario, Canada for the following reasons:

a. It would be burdensome and inconvenient for the majority of the witnesses set forth above to attend a trial in California because of the expense of travel away from their business and other pursuits.

b. It would not be possible to subpoena numerous third party Canadian witnesses for trial in California; while they are subject to process in Ontario, Canada to which transfer is sought. Such witnesses might include among others:

1) David Woodfield – Gowling Lafleur Henderson LLP; knowledge of differentiation of Greenlight Film & Television Inc. and Production Company defendants and absence of alter ego relationship.

2) GFT Circle Films Inc. (GFT Heresy Films Inc., Road Rage Films Inc., Janus Productions Inc., GFT Going Back Films Inc., GFT/Redwood KOTN Films Inc., GFT/Redwood Ignition Films Inc., and Carolyn Stamegna – legal formation of Production Company defendants.

3) Dave Bruner – former head of production services at Medallion PFA.

4) Brian White – Technicolor, formerly Medallion PFA.

5) Jane Douglas – Production Accountant, "Global Heresy" and "The Circle".

6) Adeline Elias – production accountant who managed "Going Back" accounts.

7) Tracey Boyd – "Road Rage" line producer.

8) James Mou – "The Circle" line producer.

9) Juliette Hagopian – line producer, "Going Back".

10) Gregor Hutchinson – post production supervisor for "Going Back" and for "Ignition" and for "Kevin of the North" and for "The Circle" and for "Global Heresy".

11) Warren Nimchuk, Price Waterhouse re financing and budget reviews of Production Company Defendants.

12) Jim Sternberg, former president of The Completion Guarantors and current president of Film Finances Canada.

13) John Ross, former Chairman of The Completion Guarantors. Currently Chairman of Film Finances Canada.

14) Zenon Marchowski, former loan officer and account manager of CIBC.

15) Bob Presner, former President of Film Finances Canada.

16) Debbie Mermelstein, former counsel to Film Finances Canada.

17) David Steinberg, attorney at Heenan Blaikie.

18) Claude Forest, Multimedia insurance brokers.

19) Mauro Spagnolo, former VP with CIBC.

20) Oliver Groom, post production and delivery supervisor.

All of the books and records of GFTI and myself are located in Toronto, Ontario, Canada to which transfer is sought.

c. Finally, a transfer will serve the interests of judicial economy; will prevent a waste of time and money; and Ontario, Canada presents a forum with relevant ease of access to proof as well as the availability of compulsory process regarding conduct to have alleged to have occurred in this case.

I declare under penalty of perjury under the laws of the Sate of California in accordance with the laws of the United States that the foregoing is true and correct and that this declaration was executed on the 26 day of October, 2004 at Toronto, Ontario.

/s/ Gary Howsam
GARY HOWSAM

No. 05-229

Supreme Court, U.S.
FILED
SEP 19 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

GARY HOWSAM, a Canadian national and GREENLIGHT FILM & TELEVISION INC., an Ontario, Canada corporation,

Petitioners,

v.

SUPERIOR COURT OF THE COUNTY OF LOS ANGELES,

Respondent,

COMERICA BANK, a Michigan corporation,

Real Party In Interest.

On Petition for A Writ of Certiorari to the Supreme Court of California

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to Rules 15.2 and 24.2 of the Rules of the Supreme Court of the United States, Respondent Comerica Bank, a Michigan Banking Corporation ("Comerica"), submits this brief in opposition to the Petition for Writ of Certiorari (the "Petition"), filed by Petitioners Greenlight Film and Television, Inc., d/b/a GFT Entertainment ("Greenlight") and Gary Howsam ("Howsam") (collectively, "Petitioners").

This opposition is submitted solely to bring to this Court's attention certain misstatements in the Petition regarding Petitioners' motion to quash service of summons for lack of personal jurisdiction ("Motion"), and the trial court's proceedings associated therewith. Comerica fully opposes the Petition and hereby respectfully reserves any and all rights to raise additional facts, authorities and arguments in support of its opposition, in the event this Honorable Court requests briefing pursuant to Rule 16.

In summary, Comerica objects to the following misstatements:

- The Petition repeatedly states that the trial court's exercise of personal jurisdiction was "solely" based upon allegations of "imputed conduct" based on the alter ego doctrine. *See, e.g.*, Petition, at pp. 12, 14, 16, 20, 22. This is not true. The trial court expressly based its ruling on Petitioners' own direct contacts with the state. Petition, at App. 6-7.

- Petitioners' Question Presented states that the trial court superseded "integrated contractual arrangements," but does not specify anywhere in the Petition what those "contractual arrangements" are. The only contracts at issue were loan agreements entered into by Howsam and Greenlight's alter egos, in which the parties consent to jurisdiction in California.

- In their Statement of the Case, Petitioners misrepresent the disputed and undisputed facts in the record below. Contrary to Petitioners' assertions, it is actually undisputed that forged documents were submitted to Comerica in connection with the loans at issue.

- In their Statement of the Case, Petitioners also claim that it is undisputed that neither Howsam nor Greenlight submitted forged loan documents to Comerica. This is also untrue. Comerica alleges that Howsam and Greenlight were complicit in submitting false collateral to Comerica; thus, their participation is very much at issue.

II.

STATEMENT OF THE CASE

Despite their extensive and purposeful contacts with California in furtherance of a multi-million dollar fraud scheme aimed at a California bank,[1] Petitioners persist in

[1] Petitioners argue that California does not have a compelling interest in providing a remedy for Comerica in this case on account of its Michigan citizenship. This is misleading and untrue. First, during

(Continued on following page)

their attempt to evade the California trial court's proper exercise of specific jurisdiction over them. It is undisputed that the trial court applied the proper minimum contacts analysis, as set forth by this Court in *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945). Following *International Shoe* and its progeny, the trial court held that the exercise of personal jurisdiction over Petitioners under California's long arm statute was constitutional in this case. Cal. Code Civ. Proc., § 410.10. Accordingly, even if this Court were to con-clude that it would have ruled differently, the Petition should be denied. Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

A. Procedural Background.

On December 15, 2004, the trial court denied Petitioners' Motion. The minute order does not specify if the trial court relied on one or more bases to reach its ruling [Petition, at App. 6-7]; nor does the transcript of the proceeding on the Motion contain any discussion on the matter. Petition, at App. 81-107. Rather, the trial court's minute order states that Petitioners had "sufficient contacts to exercise at least 'specific jurisdiction' over these defendants." Petition, at App. 6-7.

---

the relevant time period, Comerica Entertainment Group, the division that was the victim of Petitioners' fraud, was part of Comerica Bank California, a California banking corporation and a subsidiary of Comerica Bank. More importantly, regardless of its place of incorporation, Comerica Bank has a significant portion of its operations in California, including the presence of the entire Comerica Entertainment Group. Moreover, this action arises out of fraud committed by Petitioners against Comerica in California, and all of Comerica's officers who are witnesses in the case are in California.

B. Petitioners Committed Fraud in California.

In 1999 and 2000, Howsam came to California numerous times to negotiate financing with Comerica for a number of films he planned to produce through his company, Greenlight ("Films"). App. at p. 100: Declaration of Raymond F. Gross ("Gross Decl."), ¶3. During negotiations for the loans, which occurred in Los Angeles between Howsam and Comerica personnel, Howsam presented himself as a movie producer seeking financing for the Films. App. at p. 88: Declaration of Carmen E. Carpenter ("Carpenter Decl."), ¶5. The resulting loans, amounting to over $37 million, were negotiated by Howsam *in California*, and were funded through single purpose entities ("SPEs"), which were established by Howsam and Greenlight, to facilitate the funding of the loans. App. at pp. 89-93: Carpenter Decl., ¶¶8-10.

Consistent with normal business practices in the independent film industry, Comerica required Howsam to pre-sell certain territories and memorialize these pre-sold territories in license agreements, which would provide collateral for the bank's loans. *Id.* As a condition of making each loan, Comerica required assignments of the SPEs' right to receive license fees from various foreign film distributors. App. at pp. 94-95: Carpenter Decl., ¶14. These assignments, on which Comerica relied to make a loan to each of the SPEs, were (or were to have been) memorialized in a contract between the SPEs, Comerica and the distributor. This contract was entitled "Notice and Acknowledgment of Assignment" ("NOA"). *Id.*

Although the SPEs were the nominal borrowers on the Comerica loans, Comerica only provided funding to the

SPEs based on the collateral provided by Howsam and Greenlight in the form of the NOAs. App. at pp. 94-95: Carpenter Decl., ¶¶14-15. Many of these documents were later discovered to be falsified. *Id.* As part of its investigation into the matter, Comerica obtained and submitted to the trial court declarations by foreign distributors, in which the distributors testify that their signatures were forged on NOAs and other license agreements. App. at pp. 79-84: Declaration of Robert S. Addison, Jr. ("Addison Decl."), Exs. N, O. Petitioners' evidentiary objections to these declarations were overruled and no contrary evidence was submitted. Petition, at App. 8. Thus, this evidence is undisputed.

Comerica introduced evidence below that the falsification of the collateral, on which Comerica relied in making millions of dollars in loans, was orchestrated by Petitioners in California and was clearly directed at a California corporation. App. at pp. 49-52. Thus, the trial court could have and did find that Petitioners' direct contact with California was related to the underlying fraud and, on that basis, was sufficient to justify the exercise of personal jurisdiction over Petitioners. Petition, at App. 6-7.

C. Comerica's Borrowers (the SPEs) Are Howsam and Greenlight's Alter Ego Corporations, and Consented to Jurisdiction and Venue in Los Angeles, California.

Consistent with its normal business practices, Comerica required Howsam and Greenlight to create the SPEs as shell corporations for each film, which entities then became the borrowers for each of the subject loans. App. at pp. 89-93: Carpenter Decl., ¶¶8-10. Howsam

signed of all the loan documents on behalf of the SPEs, including the Loan and Security Agreements ("LSAs"), which provide that the parties consent to the application of California law, to jurisdiction in California, and to venue in the Los Angeles County Superior Court. App. at pp. 100-101: Gross Decl., ¶¶3-4; App. at pp. 86-89: Carpenter Decl., ¶¶1-4 and 7.

In the trial court, Comerica submitted evidence to show that the SPEs were Petitioners' alter egos. In all instances the SPEs were owned by Greenlight, or by another corporate entity of which Howsam was the owner and/or officer. App. at pp. 90-91: Carpenter Decl., ¶9. Moreover, the SPEs were virtually non-capitalized: for example, GFT Heresy (the SPE for the film *Heresy*) issued a total of ten shares, which were purchased by Greenlight for ten cents per share, for a total of $1; GFT-KOTN and GFT-Ignition (two other SPEs) each issued 101 shares at ten cents per share and, in both cases, 100 of the shares were purchased by Greenlight (49 shares) and Redwood Films, Inc. (51 shares), both of which are Howsam controlled entities. *Id.*

Although the SPEs signed loan documents subjecting them to jurisdiction and venue in Los Angeles, Comerica argued that the SPEs were alter egos of Howsam and Greenlight because they were undercapitalized, established and owned by Petitioners, and used for a fraudulent purpose. App. at pp. 63-67. Though the trial court did not expressly rule on the issue, there was sufficient evidence for the trial court below to adopt Comerica's argument that Petitioners consented to jurisdiction in California.

III.

ARGUMENT

A. The Petition Contains Misstatements of Fact.

Pursuant to Rule 15.2, Comerica submits the following clarifications with respect to the misstatements of fact contained in Petitioners' brief, which are pertinent to this Court's understanding of the case:

1. In their Question Presented, Petitioners state that the trial court's exercise of personal jurisdiction was "solely" based upon allegations of imputed conduct. Petition, at p. i. The trial court's ruling contains no such language limiting its basis for exercising jurisdiction. Petition, at App. 6-7. In its First Amended Complaint ("Complaint"), Comerica alleged direct participation by Petitioners in the scheme to defraud Comerica, and the record contains evidence that Petitioners had direct contact with California related to the loans in question. App. at pp. 1, 49-50. Howsam came to California to negotiate the loans with Comerica. App. at p. 87. The trial court properly ruled that Petitioners had direct contact with California, which contact was related to obtaining the loans at issue in this action. This direct conduct was the basis for the trial court's ruling.

2. Petitioners' Question Presented also states that the trial court superseded "integrated contractual arrangements that did not provide for jurisdiction" in California. Petition, at p. i. It is unclear what "contractual arrangements" are referred to because Petitioners did not enter into any contracts with Comerica. The SPEs, however, did execute loan documents which provided for jurisdiction and venue in California. App. at p. 51. Thus, the statement is misleading.

3. In their Statement of the Case, paragraph 1 ("Real Party in Interest"), Petitioners discuss the presence of Comerica's affiliated corporate entities in Canada. Petition, at pp. 1-2. This evidence, even if accurate, was not before the trial court and is totally irrelevant to this Court's review of the Petition.

4. At paragraph 4 of their Statement of the Case ("Comerica's Allegations of Fraud"), Petitioners present as the issue in this case, "*whether certain minimum guarantee agreements provided from foreign distributors . . . were forged or fraudulent.*" Petition, at p. 9. Petitioners' representation that the forgeries are in question is untrue. The undisputed evidence showed that the distribution agreements were forged. App. at pp. 79-84: Addison Decl., Exs. O, N. The issue is who forged them. (Comerica alleges that Petitioners were complicit in forging the agreements. App. at pp. 6-7.)

5. Also in paragraph 4 of their Statement of the Case, Petitioners state that "*it is undisputed that neither Howsam nor anyone acting on [Greenlight's] behalf actually submitted the allegedly fraudulent foreign distributor minimum guarantee agreements at issue to Comerica Bank.*" Petition, at p. 10. This is untrue.

Comerica alleges in its Complaint that Howsam delivered forged License Agreements and Notices of Assignment of fees (NOAs) to Comerica. App. at p. 11. For example, a License Agreement and NOA were submitted to Comerica, which were purported to have been executed on behalf of Rapi Films by Sunny Samtani, a Rapi Production Executive, in September 2000. App. at p. 75. Mr. Samtani declared under penalty of perjury that he never signed either of the documents and that his signature was forged.

App. at pp. 79-82. Petitioners' objections to the Samtani Declaration were overruled and no contrary evidence was introduced. Petition, at App. 8.

In addition, other collateral documents were submitted to Comerica in which Mesrich Holdings Limited ("Mesrich"), purportedly agreed to purchase the right to exploit the film *Ignition* in Italy, in exchange for a payment of $450,000. App. at p. 75. Comerica submitted the declaration of Mesrich's directors, Andres Sanchez and Mirian Rivera, stating under penalty of perjury that no Mesrich director or officer ever signed either of the documents and that the purported signatures were forged. App. at pp. 82-84. Petitioners' objections to the Mesrich Declaration were overruled and no contrary evidence was introduced. Petition, at App. 8.

Comerica alleges that the forged Rapi and Mesrich documents were submitted by Howsam or by someone acting on his behalf. App. at pp. 11-12. If, as Comerica alleges, Petitioners were responsible for submitting the falsified collateral, then this would further evidence direct conduct aimed at California. The matter of who submitted forged collateral to Comerica is very much in dispute, therefore, and, in fact, is a crucial issue in the case.

6. Petitioners' paragraph summarizing the Proceedings in the California Courts misrepresents the trial court's December 15, 2004, ruling denying Petitioners' Motion. Petitioners assert that the trial court found specific jurisdiction "*based upon imputed conduct under an alter ego theory.*" Petition, at p. 11. The trial court's minute order, to which Petitioners cite, does not actually address the question of whether the SPE defendants were alter

egos of Petitioners (as Comerica alleged). Petition, at App. 6-7. Rather, the trial court based its ruling on Petitioners' own *direct* contact with California, stating that Petitioners had "*sufficient contacts to exercise at least 'specific jurisdiction' over these defendants.*" *Id.* (emphasis added). Despite this unambiguous ruling and the allegations of the Complaint, the Petition repeatedly states that the trial court's ruling was not based on Petitioners' direct contact with California. *See, e.g.*, Petition, at pp. 12, 14, 16, 20, 22. These misstatements are misleading at best and should be disregarded.

7. In paragraph A of their Statement of Reasons for Granting the Writ ("Summary of Argument"), Petitioners state that "*the sole basis for jurisdiction in California emanates from the jurisdiction and venue provisions included in the bank's loan and security agreements, but Petitioners are not parties to any of those agreements.*" Petition, at p. 13. Once again, Petitioners are reading findings into the trial court's minute order that simply are not there.

It is undisputed that Howsam personally signed all the loan documents on behalf of the SPEs, including the Loan and Security Agreements ("LSAs"), which provide that the parties consent to the application of California law, to jurisdiction in California, and to venue in the Los Angeles County Superior Court. In all instances, the SPEs were owned by Petitioners or by entities that they owned and/or controlled. App. at pp. 89-91: Carpenter Decl., ¶¶9-10. It is also undisputed, however, that Howsam – an officer of Greenlight – personally came to California to negotiate the loans. App. at p. 100. Thus, the SPE contracts were not the "sole" basis on which the trial court

could have exercised personal jurisdiction of Petitioners in this case.

IV.

CONCLUSION

As set forth above, it is undisputed that the trial court applied the proper minimum contacts analysis in exercising personal jurisdiction over Petitioners in this case. Moreover, Petitioners misrepresent the record below, as set forth in this opposition. Even if this Court finds that it would have ruled differently, the Petition should be denied. *See* Supreme Court Rule 10. Accordingly, Comerica respectfully requests that certiorari be denied and that no briefing schedule be set in this matter.

Respectfully submitted,

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DATED: September 19, 2005

APPENDIX

Page

Appendix A

First Amended Complaint of Comerica Bank.....App. 1

Appendix B

Opposition of Comerica Bank to Motion of Defendants Gary Howsam and Greenlight Film and Television, Inc., to Quash Service of Summons for Lack of Personal Jurisdiction.....App. 47

Appendix C

Declaration of Robert S. Addison, Jr., in Support of Opposition of Comerica Bank to Motion of Defendants Gary Howsam and Greenlight Film and Television, Inc., to Quash Service of Summons for Lack of Personal Jurisdiction .....App. 69

Appendix D

Declaration of Carmen E. Carpenter in Support of Opposition of Comerica Bank to Motion of Defendants Gary Howsam and Greenlight Film and Television, Inc., to Quash Service of Summons for Lack of Personal Jurisdiction .....App. 85

Appendix E

Declaration of Raymond F. Gross in Support of Opposition of Comerica Bank to Motion of Defendants Gary Howsam and Greenlight Film and Television, Inc., to Quash Service of Summons for Lack of Personal Jurisdiction.....App. 98

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

COMERICA BANK, a Michigan Banking Corporation,

Plaintiff,

vs.

GARY HOWSAM, an individual; GFT ENTERTAINMENT, INC., an Ontario corporation, also known as GFTE, INC., and successor to GREENLIGHT FILM AND TELEVISION, INC. D/B/A/ GFT ENTERTAINMENT; GREENLIGHT FILM AND TELEVISION, INC. D/B/A/ GFT ENTERTAINMENT, an Ontario Corporation; GFT CIRCLE

CASE NO. BC316406

FIRST AMENDED COMPLAINT

1. **Breach of Written Contract;**
2. **Fraud and Deceit;**
3. **Conspiracy to Defraud;**
4. **Fraudulent Inducement;**
5. **Accounting;**
6. **Money Had and Received;**
7. **Account Stated; and,**
8. **Open Book Account.**

FILMS, INC., an Ontario Corporation; ROAD RAGE FILMS, INC., a Corporation of unknown origin; JANUS PRODUCTIONS, INC., a Quebec Corporation; GFT GOING BACKFILMS, INC., an Ontario Corporation; GFT HERESY FILMS, INC., an Ontario Corporation; GFT/REDWOOD KOTN FILMS, INC., a British Columbia Corporation; GFT/REDWOOD IGNITION FILMS, INC., a British Columbia Corporation; ADAM BENNECKE, an individual; MICHEL GLOCKLER, an individual; and DOES 1 through 100, inclusive,

Defendant.

Plaintiff COMERICA BANK ("Comerica") alleges as follows:

I.

PARTIES, JURISDICTION, AND VENUE

Parties

1. Comerica is a Michigan banking corporation, licensed to do business in California.

2. On information and belief, Comerica alleges that defendant Gary Howsam ("Howsam") is an individual

residing in Toronto, Ontario, Canada, and is in the business of producing and licensing rights in and to motion pictures.

3. On information and belief, Comerica alleges that defendant Mishel Glockler ("Glockler") is an individual residing in Los Angeles County, California.

4. On information and belief, Comerica alleges that defendant Adam Bennecke ("Bennecke") is an individual residing in Los Angeles County, California, and at all relevant times herein was an employee of Comerica.

5. On information and belief, Comerica alleges that defendant Greenlight Film and Television, Inc. D/B/A GFT Entertainment ("Greenlight"), is an Ontario corporation authorized to do business in California.

6. On information and belief, Comerica alleges that defendant GFT Entertainment, Inc. ("GFT"), is an Ontario corporation authorized to do business in California, and is the successor to Greenlight.

7. On information and belief, Comerica alleges that defendant GFT Circle Films, Inc. ("GFT-Circle") is an Ontario corporation. On information and belief, Comerica alleges that GFT Circle was formed, organized and operated by Howsam, and/or entities formed and operated by Howsam, for the sole and limited purpose of producing and licensing rights to the motion picture entitled "The Circle."

8. On information and belief, Comerica alleges that defendant Road Rage Films, Inc. ("Road Rage") is a corporation of unknown origin. On information and belief, Comerica alleges that Road Rage was formed, organized and operated by Howsam, and/or entities formed and operated by Howsam, for the sole and limited purpose of

producing and licensing rights to the motion picture entitled "Road Rage."

9. On information and belief, Comerica alleges that defendant Janus Productions, Inc. ("Janus") is a Quebec corporation. On information and belief, Comerica alleges that Janus was formed, organized and operated by Howsam, and/or entities formed and operated by Howsam, for the sole and limited purpose of producing and licensing rights to the motion picture entitled "*Deception*."

10. On information and belief, Comerica alleges that defendant GFT Going Back Films, Inc. ("GFT-Going Back") is an Ontario corporation. On information and belief, Comerica alleges that GFT-Going Back was formed, organized and operated by Howsam, and/or entities formed and operated by Howsam, for the sole and limited purpose of producing and licensing rights to the motion picture entitled "Going Back."

11. On information and belief, Comerica alleges that defendant GFT Heresy Films, Inc. ("GFT-Heresy") is an Ontario corporation. On information and belief, Comerica alleges that GFT-Heresy was formed, organized and operated by Howsam, and/or entities formed and operated by Howsam, for the sole and limited purpose of producing and licensing rights to the motion picture entitled "Global Heresy."

12. On information and belief, Comerica alleges that defendant GFT/Redwood KOTN Films, Inc. ("GFT-KOTN") is a British Columbia corporation. On information and belief, Comerica alleges that GFT-KOTN was formed, organized and operated by Howsam, and/or entities formed and operated by Howsam, for the sole and limited

purpose of producing and licensing rights to the motion picture entitled "Kevin of the North."

13. On information and belief, Comerica alleges that defendant GFT/Redwood Ignition Films, Inc. ("GFT-Ignition") is a British Columbia corporation. On information and belief, Comerica alleges that GFT-Ignition was formed, organized and operated by Howsam, and/or entities formed and operated by Howsam, for the sole and limited purpose of producing and licensing rights to the motion picture entitled "Ignition."

14. Comerica is currently unaware of the true names and capacities of defendants sued herein as Does 1 through 100, inclusive, and therefore sues said Doe defendants by such fictitious names. Comerica will seek leave of this Court to amend this complaint to insert the true names and capacities of said Doe defendants when such information has been obtained. Comerica is further informed and believes and based thereon alleges that each of such fictitiously named defendants has participated in some way in the wrongful acts and omissions alleged below, and is liable to Comerica for damages and other relief to which it is entitled.

Successor Liability of GFT

15. On information and belief, Comerica alleges that Defendant GFT was created by Howsam as part of a scheme to escape liability for the actions of Defendant Greenlight (detailed below), and to simply continue Greenlight's business, but under a new name. For these, and possibly other, reasons, GFT, as Greenlight's successor, is liable for Greenlight's wrongful actions alleged herein. Therefore, even though Comerica is informed and

believes that GFT was not incorporated until after most or all of the wrongful actions at issue in this case, the allegations contained herein include GFT as if it *had* been incorporated at the time of the actions.

The "Howsam Parties"

16. For the reasons set forth in paragraph 15, above, Howsam, Greenlight, GFT, GFT-Circle, Road Rage, Janus, GFT-Going Back, GFT Heresy, GFT-KOTN, GFT-Ignition, and/or their agents and assigns, are hereinafter sometimes collectively referred to as the "Howsam Parties." On information and belief, Comerica alleges that the Howsam Parties are, individually and jointly, and at all times material hereto have been owned, controlled or otherwise dominated by Howsam. Comerica is further informed and believes and based thereon alleges that, at all times relevant hereto, the Howsam Parties, and each of them, was the agent, partner or other representative of the remaining Howsam Parties, and completely controlled, dominated and operated the Howsam Parties, and at all times mentioned herein was acting within the course and scope of that agency, partnership or representation. Comerica is further informed and believes and based thereon alleges that the acts and conduct of each of the Howsam Parties as alleged herein were known to, authorized by, and/or ratified by the other Howsam Parties, and each of them.

17. On information and belief, Comerica alleges that there now exists, and at all times material hereto has existed, such a unity of ownership, interest and control between the Howsam Parties, on the one hand, and Howsam, on the other hand, that any individuality or

separateness which may have existed between the Howsam Parties, on the one hand, and Howsam, on the other hand, has ceased. The Howsam Parties are the alter egos of Howsam in that Howsam has completely controlled, dominated, managed and operated the Howsam Parties, and has used those entities as mere shells or conduits through which to carry on his own business, including engaging in the acts and/or omissions set forth herein. Adherence to the fiction of the separate existence of the Howsam Parties, on the one hand, and Howsam, on the other hand, would permit an abuse of corporate privilege and would sanction fraud and promote injustice. The Howsam Parties and Howsam are consequently jointly and severally liable to Comerica for the conduct, or lack of conduct, of each other with respect to the obligations and omissions as hereafter alleged.

Jurisdiction and Venue

18. The Court has jurisdiction over the Howsam Parties pursuant to the express agreement by the Howsam Parties in the Loan and Security Agreements for each film at issue in this case, and based upon the fact that these Defendants have done and/or do business regularly in the State of California and, therefore, have sufficient contacts with California to give rise to jurisdiction of California courts over them.

19. This Court additionally has jurisdiction over Bennecke and Glockler, as they are both residents of the State of California.

20. Venue is proper in this Court pursuant to the express agreement by the Howsam Parties in the Loan and Security Agreements for each of the films at issue in

this action, as well as due to the fact that a substantial part of the events or omissions giving rise to this action occurred in Los Angeles County, and the fact that one or more of the defendants reside in this district.

II.

INTRODUCTION AND SUMMARY

21. This case arises out of a group, or "slate," of 7 films produced in 2000 and 2001 by the Howsam Parties, who were and are independent film producers. The films at issue include but are not limited to: *Deception, Going Back, Kevin of the North, Global Heresy, The Circle, Road Rage*, and *Ignition* (collectively, the "Films").

22. Based on the methods described below, Comerica provided secured financing to the Howsam parties to enable the production of the Films. These loan obligations (the "Production Loans") were secured by, among other things, the Films, and all proceeds and revenue derived from the Films. Comerica's primary collateral, from which it contemplated sufficient funds would be generated to repay the Production Loans, was licensing fees from foreign distributors, who would guarantee payment of such fees prior to a given film's production. As part of the loan agreements between the Howsam Parties and Comerica, the Howsam Parties purportedly obtained license agreements from a number of distributors, along with assignments of the guaranteed licensing fees to Comerica. Comerica relied on these license agreements and assignments in making the Production Loans.

23. The true facts were, however, that the Howsam Parties, Bennecke, and Glockler created ***fraudulent***

license agreements and assignments, and provided them to Comerica in order to induce Comerica to provide loans on the Films. The license agreements and assignments were fraudulent in that these Defendants either forged or affixed signatures upon numerous License Agreements and Notices and Acknowledgments of Assignment ("NOAs"), in an attempt to create the impression that License Agreements and NOAs were executed. In furtherance of the conspiracy, the Howsam Parties created falsely inflated production budgets in order to increase sales and/or license fees and other collateral, including tax credits and ultimately increased the amount of each Production Loan through their fraud.

24. As a direct result of these Defendants' actions, Comerica loaned money to produce the Films, was never repaid the full amount of the loans, and was left with inadequate or false security from which to seek repayment. Consequently, Comerica has been damaged in an amount in excess of $20 Million.

III.

DETAILS OF THE FINANCING OF THE FILMS

25. As independent producers, and unlike a movie studio, the Howsam Parties did not have significant capital of their own to fund production of a movie, nor did they possess collateral that would allow them to borrow the money necessary to fund production of a movie. Furthermore, like most film-finance banks, Comerica will not loan money to make a movie unless there is sufficient collateral to ensure repayment, even in the event the movie is a box office failure. Therefore, like many independent film producers, the Howsam Parties utilized a

financing arrangement by which they would provide collateral to Comerica in the form of guaranteed minimum license fees ("Minimum Guarantees") from international distributors. Minimum Guarantees are, essentially, license fees owed to a producer by a distributor for the right to distribute a given film in a particular geographic region and through specified media. To obtain a loan from Comerica, the Howsam Parties would pre-sell the distribution rights to the films to various distributors around the world, who would promise to pay Minimum Guarantees, so long as the movies were actually completed and delivered for distribution.

26. Distributors typically purchase these rights in advance of commencement of a movie's production. The purchase transaction involves the distributor signing a License Agreement, in which it guarantees it will pay the producer for the distribution rights to a film upon delivery of the completed film. "Delivery" is a defined term, which specifically defines what the producer must do to "deliver" the film and trigger the distributor's obligation to pay the license fees. Comerica requires borrowers to purchase a completion bond, which ensures that, if Comerica funds a loan, the film will actually be completed and delivered. Once the producer has obtained sufficient collateral, as described above, to cover most of the expected negative costs of production, Comerica will make the loan.

27. Furthermore, in order to ensure that the Minimum Guarantees were ultimately paid to Comerica, and not diverted by the Howsam Parties, the distributors were required to sign NOAs, acknowledging that, upon delivery of the film, the distributor would pay the Minimum Guarantees directly to Comerica, rather than to the Howsam Parties.

28. The borrowers for each production were single purpose entities ("SPEs"), created and controlled by Howsam, in connection with each particular motion picture. For each loan, Howsam executed a Loan and Security Agreement ("LSA"), an Interparty Agreement, and other related agreements evidencing the loan obligations.

29. Hilltop Entertainment, LLC ("Hilltop"), by whom defendant Glockler was employed, acted as the sales agent for the Howsam Parties in connection with the Films. In that capacity, Hilltop, on behalf of the Howsam Parties, in instances purported to enter into License Agreements (also referred to hereinafter as "Distribution Agreements") and NOAs with various distributors.

IV.

THE DEFENDANTS' WRONGDOING

30. In order for Comerica to loan money for the production of the Films, the Howsam Parties were required to provide the collateral described above. Working with Glockler and Bennecke, the Howsam Parties delivered License Agreements and NOAs, which they represented to Comerica were executed by the relevant distributors, and were thus legitimate. Comerica is informed and believes, however the true facts were that the Howsam Parties, Bennecke, and Glockler created and delivered ***fraudulent*** License Agreements and NOAs by either forging or affixing signatures upon numerous License Agreements and NOAs, in an attempt to create the impression that distribution agreements and assignments of Minimum Guarantees were in place. These Defendants created these false documents with full

knowledge that they would induce Comerica to rely on them as collateral and to make the Production Loans.

31. In reality, the purported Distribution Agreements did not exist. The distributors who were the purported parties to the various agreements have informed Comerica that they did not enter into the purported agreements bearing their names on such documents.

32. Based upon these defendants' actions, Comerica was led to believe that distribution rights were pre-sold to international distributors, that the Howsam Parties had assigned the Minimum Guarantees to Comerica, and that those distributors had promised to pay the Minimum Guarantees directly to Comerica as collateral. Comerica relied upon the Minimum Guarantees in making the Production Loans and was thereon induced to make the loans. Had Comerica been aware of the actual facts surrounding the License Agreements and NOAs, Comerica would not have made the Production Loans. Since Comerica made the Production Loans with insufficient collateral to secure repayment, and since those loans have not been repaid as agreed by the Howsam Parties, Comerica has been damaged in excess of $20 Million.

33. Furthermore, Comerica is informed and believes that the Howsam Parties provided Comerica with budgets that over-estimated the funds needed to complete the relevant Films. As a result, the Howsam Parties were able to "skim" money out of the loan proceeds, which were never used to make the Films, in violation of the various bond agreements, and which were never repaid to Comerica.

34. Further specifics of the Defendants' wrongful actions with regard to each of the Films are as follows:

A. Deception

Loan Agreement, Interparty Agreement, and Sales Agency Agreement

35. Howsam established and controlled Janus Productions Inc. ("Janus") for the purpose of producing the motion picture *Deception*.

36. Howsam, through Janus, entered into a Loan and Security Agreement and an Interparty Agreement, both of which were dated November 27, 1999, with Comerica for the purpose of borrowing up to $1,775,000 for the production of *Deception* (these agreements are referred to collectively as the "Deception Loan Agreement"). Copies of the Loan and Security Agreement and Interparty Agreement are attached hereto as Exhibits "A" and "B," respectively, and are incorporated herein by this reference. As security for the obligations under the Deception Loan Agreement, Howsam and Janus pledged all of their interest, rights and title to *Deception* and any and all proceeds generated therefrom to Comerica.

37. Howsam, through Janus, entered into a Sales Agency Agreement with Hilltop, dated October 19, 1999, pursuant to which Janus Productions appointed Hilltop as its sales agent for the purpose of entering into license agreements for the exploitation of *Deception* in certain territories.

Forged License Agreements and Notices of Assignment.

Tele-Munchen

38. On or about on September 9, 1999, Howsam, through Janus, entered into a license agreement, with

Tele-Munchen Fernseh GmbH & Co. Produktiongesellschaft, a German corporation ("Tele-Munchen"), whereby Tele-Munchen purchased the right to exploit *Deception* within German-Speaking Europe in exchange for the payment of $250,000 by Tele-Munchen.

39. For the purposes of inducing Comerica to enter into the Deception Loan Agreement, Howsam, through Janus, purported to enter into an undated NOA agreement with Tele-Munchen, which appeared to assign the payment of a Minimum Guarantee in the amount of $250,000 by Tele-Munchen, to Comerica ("Deception Tele-Munchen NOA"). The Deception Tele-Munchen NOA contained a forged signature as it was not signed by Herbert Kloiber or anyone else authorized to sign on behalf of Tele-Munchen.

Videx International S.A.

40. On or about December 3, 1999, Howsam, through Janus, purported to enter into a license agreement with Videx International S.A. ("Videx") whereby Videx purported to purchase the right to exploit *Deception* within the territories of Mexico, Central America, Dominican Republic, Puerto Rico, Caribbean Island, and South America including Brazil in exchange for the payment of $100,000 by Videx ("Deception Videx License Agreement").

41. On or about December 3, 1999, in conjunction with the Deception Videx License Agreement, Howsam, through Janus, purported to enter into an NOA agreement with Videx, which appeared to assign the payment of a Minimum Guarantee in the amount of $100,000 by Videx, to Comerica ("Deception Videx NOA") (the Deception Videx License Agreement and the Deception Videx NOA shall hereafter be collectively referred to as the "Deception

Videx Distribution Agreements"). The Deception Videx Distribution Agreements were forged since they were not signed by Cynthia Murray or anyone else authorized to sign on behalf of Videx.

B. Going Back

Loan Agreement, Interparty Agreement, and Sales Agency Agreement

42. Howsam established and controlled GFT Going Back Films, Inc. ("GFT-Going Back") for the purpose of producing the motion picture *Going Back*.

43. Howsam, through GFT-Going Back, entered into a Loan and Security Agreement and an Interparty Agreement, both of which were dated April 7, 2000, with Comerica, for the purpose of borrowing up to $4,764,000 for the production of *Going Back* (these agreements are collectively referred to as the "Going Back Loan Agreement"). Copies of the Loan and Security Agreement and Interparty Agreement are attached hereto as Exhibits "C" and "D," respectively. As security for the obligations under the Going Back Loan Agreement, Howsam and GFT-Going Back, pledged all of their interest, rights and title to *Going Back* and any and all proceeds generated therefrom to Comerica.

44. Howsam, through GFT-Going Back, entered into a Sales Agency Agreement with Hilltop, dated March 6, 2000, pursuant to which Howsam, through GFT-Going Back, granted to Hilltop their distribution rights in and to *Going Back* for certain territories.

Forged License Agreements and Notices of Assignment

Eagle Pictures (Italy)

45. On or about March 30, 2000, Howsam, through GFT-Going Back, purported to enter into a license agreement with Eagle Pictures SPA ("Eagle Pictures"), whereby Eagle Pictures appeared to purchase the right to exploit *Going Back* within Italy in exchange for the payment of $450,000 by Eagle Pictures ("Going Back Eagle Pictures License Agreement").

46. On or about March 29, 2000, in conjunction with the Going Back Eagle Pictures License Agreement, Howsam, through GFT-Going Back, purported to enter into an NOA agreement with Eagle Pictures, which appeared to assign the payment of a Minimum Guarantee in the amount of $450,000 by Eagle Pictures, to Comerica ("Going Back Eagle Pictures NOA") (the Going Back Eagle Pictures License Agreement and the Going Back Eagle Pictures NOA shall hereafter be collectively referred to as the "Going Back Eagle Pictures Distribution Agreements"). The Going Back Eagle Pictures Distribution Agreements were forged since they were not signed by Stefano Dammicco or anyone else on behalf of Eagle Pictures.

Tele-Munchen

47. On or about April 3, 2000, Howsam, through GFT-Going Back, purported to enter into a license agreement with Tele-Munchen, whereby Tele-Munchen appeared to purchase the right to exploit *Going Back* on the terms set forth therein in exchange for the payment of $850,000 by Tele-Munchen ("Going Back Tele-Munchen License Agreement").

48. On or about April 5, 2000, in conjunction with the Going Back Tele-Munchen License Agreement, Howsam, through GFT-Going Back, purported to enter into an NOA agreement with Tele-Munchen, which purported to assign the payment of a Minimum Guarantee in the amount of $850,000 by Tele-Munchen, to Comerica ("Going Back Tele-Munchen NOA") (the Going Back Tele-Munchen License Agreement and the Going Back Tele-Munchen NOA shall hereafter be collectively referred to as the "Going Back Tele-Munchen Distribution Agreements"). The Going Back Tele-Munchen Distribution Agreements were forged since they were not signed by Herbert Kloiber or anyone else authorized to sign on behalf of Tele-Munchen.

Television Francaise 1

49. On or about April 3, 2000, Howsam, through GFT-Going Back, purported to enter into a license agreement with Television Francaise 1 ("TF-1"), whereby TF-1 appeared to purchase the right to exploit *Going Back* within the territories of France and French-Speaking Benelux in exchange for the payment of $550,000 by TF-1 ("Going Back TF-1 License Agreement").

50. On or about April 7, 2000, in conjunction with the Going Back TF-1 License Agreement, Howsam, through GFT-Going Back, purported to enter into an NOA agreement with TF-1, which appeared to assign the payment of a Minimum Guarantee in the amount of $550,000 by TF-1, to Comerica ("Going Back TF-1 NOA") (the Going Back TF-1 License Agreement and the Going Back TF-1 NOA shall hereafter be collectively referred to as the "Going Back TF-1 Distribution Agreements"). The

Going Back TF-1 Distribution Agreements were forged since they were not signed by Fabrice Bailly or anyone else authorized to sign on behalf of TF-1.

Filmax Communications

51. On or about March 29, 2000, Howsam, through GFT-Going Back, purported to enter into a license agreement with Sociedad General De Derechos Audiovisuales, S.A. (Sogedasa) ("Sogedasa"), owner of all rights related to the name Filmax, under the name Filmax Communications ("Filmax"), whereby Filmax agreed to purchase the right to exploit *Going Back* within Spain in exchange for the payment of $350,000 by Filmax ("Going Back Filmax License Agreement").

52. On or about March 29, 1999, in conjunction with the Going Back Filmax License Agreement, Howsam, through GFT-Going Back, purported to enter into an NOA agreement with Filmax, which appeared to assign the payment of a Minimum Guarantee in the amount of $350,000 by Filmax, to Comerica ("Going Back Filmax NOA") (the Going Back Filmax License Agreement and the Going Back Filmax NOA shall hereafter be collectively referred to as the "Going Back Filmax Distribution Agreements"). The Going Back Filmax Distribution Agreements were forged since they were not signed by Carlos Fernandez or anyone else authorized to sign on behalf of Sogedasa or Filmax.

C. Kevin of the North

Loan Agreement, Interparty Agreement, and Sales Agency Agreement

53. Howsam established and controlled GFT/ Redwood KOTN Films, Inc. ("GFT-KOTN") for the purpose of producing the motion picture *Kevin of the North*.

54. Howsam, through GFT-KOTN, entered into a Loan and Security Agreement and an Interparty Agreement, both of which were dated May 30, 2000, with Comerica for the purposes of borrowing $10,428,000 for the production of *Kevin of the North* (these agreements are collectively referred to as the "KOTN Loan Agreement"). Copies of the Loan and Security Agreement and Interparty Agreement are attached hereto as Exhibits "E" and "F," respectively. As security for the KOTN Loan Agreement, Howsam and GFT-KOTN pledged all of their interest, rights and title to *Kevin of the North* and any and all proceeds generated therefrom to Comerica.

55. Howsam, through GFT-KOTN, entered into a Sales Agency Agreement with Hilltop, dated April 28, 2000, pursuant to which Howsam, through GFT-KOTN, appointed Hilltop as the sales agent for the purposes of entering into license agreements for exploitation of *Kevin of the North* in all territories of the world except for the United States, Canada, the United Kingdom, France, Germany, Benelux, Greece and Eastern Europe, among others.

Forged License Agreements and Notices of Assignments

Dall'Angelo Pictures

56. On or about May 14, 2000, Howsam, through GFT-KOTN, purported to enter into a license agreement with Dall'Angelo Pictures ("Dall'Angelo"), whereby Dall'Angelo appeared to purchase the right to exploit *Kevin of the North* within the territories of Italy, San Marino, Vatican City, Italian Speaking Switzerland, among others, in exchange for the payment of $700,000 by Dall'Angelo ("KOTN Dall'Angelo License Agreement").

57. On or about June 1, 2000, in conjunction with the KOTN Dall'Angelo License Agreement, Howsam, through GFT-KOTN, purported to enter into an NOA agreement with Dall'Angelo, which appeared to assign the payment of a Minimum Guarantee in the amount of $700,000 by Dall'Angelo, to Comerica ("KOTN Dall'Angelo NOA") (the KOTN Dall'Angelo License Agreement and the KOTN Dall'Angelo NOA shall hereafter be collectively referred to as the "KOTN Dall'Angelo Distribution Agreements"). The KOTN Dall'Angelo Distribution Agreements were forged since they were not signed by Barbara Dall'Angelo, or any other Dall'Angelo representative authorized to sign on behalf of Dall'Angelo.

D. Global Heresy

Loan Agreement, Interparty Agreement, and Sales Agency Agreement

58. Howsam established and controlled GFT Heresy Films, Inc. ("GFT-Heresy") for the purpose of producing the motion picture *Global Heresy*.

59. Howsam, through GFT-Heresy, entered into a Loan and Security Agreement and an Interparty Agreement, both of which were dated October 10, 2000, with Comerica for the purposes of borrowing up to $4,425,000 for the production of *Global Heresy* (these agreements are collectively referred to as the "Global Heresy Loan Agreement"). Copies of the Loan and Security Agreement and Interparty Agreement are attached hereto as Exhibits "G" and "H," respectively. As security for the loan obligations, Howsam and GFT-Heresy pledged all of their interest, rights and title to *Global Heresy* and any and all proceeds generated therefrom to Comerica.

60. Howsam, through GFT-Heresy, entered into a Sales Agency Agreement with Hilltop, dated September 15, 2000, pursuant to which Howsam, through GFT-Heresy, appointed Hilltop as the sales agent for the purposes of entering into license agreements for exploitation of *Global Heresy* in all territories of the world except for the United States, Canada and the United Kingdom.

Forged License Agreements and Notice of Assignment

Eagle Pictures (Italy)

61. On or about September 2, 2000, Howsam, through GFT-Heresy, purported to enter into a license agreement with Eagle Pictures, whereby Eagle Pictures appeared to purchase the right to exploit *Global Heresy* within Italy in exchange for the payment of $600,000 by Eagle Pictures ("Global Heresy Eagle Pictures License Agreement").

62. On or about October 12, 2000, in conjunction with the Global Heresy Eagle Pictures License Agreement,

Howsam, through GFT-Heresy, purported to enter into an NOA agreement with Eagle Pictures, which appeared to assign the payment of a Minimum Guarantee in the amount of $600,000 by Eagle Pictures, to Comerica ("Global Heresy Eagle Pictures NOA") (the Global Heresy Eagle Pictures License Agreement and the Global Heresy Eagle Pictures NOA shall hereafter be collectively referred to as the "Global Heresy Eagle Pictures Distribution Agreements"). The Global Heresy Eagle Pictures Distribution Agreements were forged since they were not signed by Stefano Dammicco or anyone else authorized to sign on behalf of Eagle Pictures.

Tele-Munchen

63. On or about October 12, 2000, Howsam, through GFT-Heresy, purported to enter into a license agreement with Tele-Munchen, whereby Tele-Munchen appeared to purchase the right to exploit *Global Heresy* on the terms set forth therein in exchange for the payment of $800,000 by Tele-Munchen ("Global Heresy Tele-Munchen License Agreement").

64. On or about October 12, 2000, in conjunction with the Global Heresy Tele-Munchen License Agreement, Howsam, through GFT-Heresy, purported to enter into an NOA agreement with Tele-Munchen, which appeared to assign the payment of a Minimum Guarantee in the amount of $800,000 by Tele-Munchen, to Comerica ("Global Heresy Tele-Munchen NOA") (the Global Heresy Tele-Munchen License Agreement and the Global Heresy Tele-Munchen NOA shall hereafter be collectively referred to as the "Global Heresy Tele-Munchen Distribution

Agreements"). The Global Heresy Tele-Munchen Distribution Agreements were forged since they were not signed by Herbert Kloiber or anyone else authorized to sign on behalf of Tele-Munchen.

Hellas World International S.A.

65. On or about October 4, 2000, Howsam, through GFT-Heresy, purported to enter into a license agreement with Hellas World International S.A. ("Hellas World"), whereby Hellas World appeared to purchase the right to exploit *Global Heresy* within the territories of Greece and Cyprus in exchange for the payment of $15,000 by Hellas World ("Global Heresy Hellas World License Agreement").

66. On or about October 4, 2000, in conjunction with the Global Heresy Hellas World License Agreement, Howsam, through GFT-Heresy, purported to enter into an NOA agreement with Hellas World, which appeared to assign the payment of a Minimum Guarantee in the amount of $15,000 by Hellas World, to Comerica ("Global Heresy Hellas World NOA") (the Global Heresy Hellas World License Agreement and the Global Heresy Hellas World NOA shall hereafter be collectively referred to as the "Global Heresy Hellas World Distribution Agreements"). The Global Heresy Hellas World Distribution Agreements were forged since they were not signed by any Hellas World representative authorized to sign on behalf of Hellas World.

Filmax

67. On or about September 2, 2000, Howsam, through GFT-Heresy, purported to enter into a license

agreement with Sogedasa, under the name Filmax, whereby Filmax appeared to purchase the right to exploit *Global Heresy* within Spain in exchange for the payment of $350,000 by Filmax ("Global Heresy Filmax License Agreement").

68. On or about September 2, 2000, in conjunction with the Global Heresy Filmax License Agreement, Howsam, through GFT-Heresy, purported to enter into an NOA agreement with Filmax, which appeared to assign the payment of a Minimum Guarantee in the amount of $350,000 by Filmax, to Comerica ("Global Heresy Filmax NOA") (the Global Heresy Filmax License Agreement and the Global Heresy Filmax NOA shall hereafter be collectively referred to as the "Global Heresy Filmax Distribution Agreements"). The Global Heresy Filmax Distribution Agreements were forged since they were not signed by Carlos Fernandez, or anyone else authorized to sign on behalf of Sogedasa or Filmax.

Rapi Films

69. On or about September 2, 2000, Howsam, through GFT-Heresy, purported to enter into a license agreement with Rapi Films, whereby Rapi Films appeared to purchase the right to exploit *Global Heresy* within Indonesia in exchange for the payment of $5,000 by Rapi Films ("Global Heresy Rapi Films License Agreement").

70. On or about September 2, 2000, in conjunction with the Global Heresy Rapi Films License Agreement, Howsam, through GFT-Heresy, purported to enter into an NOA agreement with Rapi Films, which appeared to assign the payment of a Minimum Guarantee in the amount of $5,000 by Rapi Films, to Comerica ("Global

Heresy Rapi Films NOA") (the Global Heresy Rapi Films License Agreement and the Global Heresy Rapi Films NOA shall hereafter be collectively referred to as the "Global Heresy Rapi Films Distribution Agreements"). The Global Heresy Rapi Films Distribution Agreements were forged since they were not signed by a Rapi Films representative authorized to sign on behalf of Rapi Films.

Digital Right Pictures Public Co., Ltd.

71. Howsam, through GFT-Heresy, purported to enter into an undated license agreement with Digital Right Pictures Public Co., Ltd. ("Digital Right"), whereby Digital Right appeared to purchase the right to exploit *Global Heresy* within Thailand in exchange for the payment of $20,000 by Digital Right ("Global Heresy Digital Right License Agreement").

72. On or about October 3, 2000, in conjunction with the Global Heresy Digital Right License Agreement, Howsam, through GFT-Heresy, purported to enter into an NOA agreement with Digital Right, which appeared to assign the payment of a Minimum Guarantee in the amount of $20,000 by Digital Right, to Comerica ("Global Heresy Digital Right NOA") (the Global Heresy Digital Right License Agreement and the Global Heresy Digital Right NOA shall hereafter be collectively referred to as the "Global Heresy Digital Right Distribution Agreements"). The Global Heresy Digital Right Distribution Agreements were forged since they were not signed by a Digital Right representative authorized to sign on behalf of Digital Right.

E. The Circle

Loan Agreement, Interparty Agreement, and Sales Agency Agreement

73. Howsam established and controlled GFT Circle Films, Inc. ("GFT-Circle") for the purpose of producing the motion picture *The Circle*.

74. Howsam, through GFT-Circle, entered into a Loan and Security Agreement and an Interparty Agreement, both of which were dated November 24, 2000, with Comerica for the purposes of borrowing $1,700,000 for the production of *The Circle* (these agreements are collectively referred to as "The Circle Loan Agreement"). Copies of the Loan and Security Agreement and Interparty Agreement are attached hereto as Exhibits "I" and "J," respectively. As security for the loan obligations, Howsam and GFT-Circle pledged all of their interest, rights and title to *The Circle* and any and all proceeds generated therefrom to Comerica.

75. Howsam, through GFT-Circle, entered into a Sales Agency Agreement with Hilltop, dated January 30, 2001, pursuant to which Howsam and Circle Films appointed Hilltop as the sales agent for the purposes of entering into license agreements for exploitation of *The Circle* in all territories of the world except for the United States and Canada.

Forged License Agreements and Notices of Assignment

Tele-Munchen

76. On or about February 23, 2001, Howsam, through GFT-Circle, purported to enter into a license

agreement with Tele-Munchen, whereby Tele-Munchen appeared to purchase the right to exploit *The Circle* on the terms set forth therein in exchange for the payment of $100,000 by Tele-Munchen ("The Circle Tele-Munchen License Agreement").

77. On or about February 23, 2001, in conjunction with The Circle Tele-Munchen License Agreement, Howsam, through GFT-Circle, purported to enter into an NOA agreement with Tele-Munchen, which appeared to assign the payment of a Minimum Guarantee in the amount of $100,000 by Tele-Munchen, to Comerica ("The Circle Tele-Munchen NOA") (The Circle Tele-Munchen License Agreement and The Circle Tele-Munchen NOA shall hereafter be collectively referred to as the "Circle Tele-Munchen Distribution Agreements"). The Circle Tele-Munchen Distribution Agreements were forged since they were not signed by Herbert Kloiber or anyone else authorized to sign on behalf of Tele-Munchen.

Videx

78. On or about February 24, 2001, Howsam, through GFT-Circle, purported to enter into a license agreement with Videx, whereby Videx appeared to purchase the right to exploit *The Circle* within the territories of Latin America, including Brazil in exchange for the payment of $115,000 by Videx ("The Circle Videx License Agreement").

79. On or about February 24, 2001, in conjunction with The Circle Videx License Agreement, Howsam, through GFT-Circle, purported to enter into an NOA agreement with Videx, which appeared to assign the payment of a Minimum Guarantee in the amount of

$115,000 by Videx, to Comerica ("The Circle Videx NOA") (The Circle Videx License Agreement and The Circle Videx NOA shall hereafter be collectively referred to as the "Circle Videx Distribution Agreements"). The Circle Videx Distribution Agreements were forged since they were not signed by Cynthia Murray or anyone else authorized to sign on behalf of Videx.

Imperial Films S.A. Notice of Assignment

80. Howsam, through GFT-Circle, entered into a license agreement, with Imperial Films S.A. ("Imperial Films"), whereby Imperial Films purchased the right to exploit *The Circle*, on the terms set forth therein, in exchange for the payment of an amount in excess of $268,200 by Imperial Films.

81. On or about April 11, 2001, Howsam, through GFT-Circle, purported to enter into an NOA agreement with Imperial Films, which appeared to assign the payment of a Minimum Guarantee in the amount of at least $268,200 by Imperial Films, to Comerica ("Circle Imperial Films NOA") The Circle Imperial Films NOA was forged since it was not signed by an Imperial Films representative authorized to sign on behalf of Imperial Films.

PCV S.A.

82. On or about February 23, 2001, Howsam, through GFT-Circle, purported to enter into a license agreement with PCV S.A. ("PCV"), whereby PCV appeared to purchase the right to exploit *The Circle* within Greece in exchange for the payment of $8,000 by PCV ("The Circle PCV License Agreement").

83. On or about February 23, 2001, in conjunction with The Circle PCV License Agreement, Howsam, through GFT-Circle, purported to enter into an NOA agreement with PCV, which appeared to assign the payment of a Minimum Guarantee in the amount of $8,000 by PCV, to Comerica ("The Circle PCV NOA") (The Circle PCV License Agreement and The Circle PCV NOA shall hereafter be collectively referred to as the "Circle PCV Distribution Agreements"). The Circle PCV Distribution Agreements were forged since they were not signed by a PCV representative authorized to sign on behalf of PCV.

F. Road Rage

Loan Agreement, Interparty Agreement, and Sales Agency Agreement

84. Howsam established and controlled GFT Road Rage Films Inc. ("GFT-Road Rage") for the purpose of producing the motion picture *Road Rage*.

85. Howsam, through GFT-Road Rage, entered into a Loan and Security Agreement and an Interparty Agreement, both of which were dated September 20, 1999, with Comerica for the purpose of borrowing up to $1,575,000 for the production of *Road Rage*. This Loan and Security Agreement was thereafter amended, on November 19, 1999, to increase the loan amount by $450,000, to a total of up to $2,025,000 (these agreements are collectively referred to as the "Road Rage Loan Agreement"). Copies of the Loan and Security Agreement and Interparty Agreement are attached hereto as Exhibits "K" and "L," respectively. As security for the loan obligations, Howsam and GFT-Road Rage pledged all of their interest, rights and

title to *Road Rage* and any and all proceeds generated therefrom to Comerica.

86. Howsam, through GFT-Road Rage, entered into a Sales Agency Agreement with Hilltop, dated August 10, 1999, pursuant to which Howsam and GFT-Road Rage appointed Hilltop as the sales agent for the purpose of entering into license agreements for the exploitation of *Road Rage* in all territories of the world except for the United States and Canada.

87. Comerica is presently unaware of any forged License Agreements or NOAs associated with this Film. However, the LSA for this Film contained provisions by which the Production Loan on this Film was cross-collateralized with another of the Films. In fact, most or all of the Films were cross-collateralized with one or more of the other Films. Cross-collateralization involves granting a security interest for one Film in the collateral pledged for one of the other Films. This way, if one of the Production Loans is paid off, the collateral pledged may be applied to pay off another of the Films. All of the Production Loans for Films on the GFT Slate were made within a close time-period, and Comerica generally viewed the Production Loans collectively as related to one another.

88. In making the loan on Road Rage, Comerica relied upon the representations made by the Howsam Parties and others with regard to the other Films. Therefore, to the extent any misrepresentations were made on the other Films, Comerica relied thereon to its detriment in making the Production Loan for Road Rage.

G. Ignition

Loan Agreement, Interparty Agreement, and Sales Agency Agreement

89. Howsam established and controlled GFT/ Redwood Ignition Films, Inc. ("GFT-Ignition") for the purpose of producing, the motion picture *Ignition*.

90. Howsam, through GFT-Ignition, entered into a Loan and Security Agreement and an Interparty Agreement, both of which were dated June 23, 2000, with Comerica for the purposes of borrowing $12,469,121 for the production of *Ignition* (these agreements are collectively referred to as the "Ignition Loan Agreement"). Copies of the Loan and Security Agreement and Interparty Agreement are attached hereto as Exhibits "M" and "N," respectively. As security for the loan obligations, Howsam and GFT-Ignition pledged all of their interest, rights and title to *Ignition* and any and all proceeds generated therefrom to Comerica.

91. Howsam, through GFT-Ignition, entered into a Sales Agency Agreement with Hilltop, dated April 28, 2000, pursuant to which Howsam and GFT-Ignition appointed Hilltop as the sales agent for the purpose of entering into license agreements for the exploitation of *Ignition* in all territories of the world except for the United States, Canada, the United Kingdom, France, Germany, Benelux, Greece and Eastern Europe, among others.

Forged License Agreements and Notices of Assignment

Mesrich Holdings Limited

92. On or about June 21, 2000, Howsam, through GFT-Ignition, purported to enter into a license agreement with Mesrich Holdings Limited ("Mesrich"), whereby Mesrich appeared to purchase the right to exploit *Ignition* within the territories of Italy, among others, in exchange for the payment of $450,000 by Mesrich ("Ignition Mesrich License Agreement").

93. On or about June 26, 2000, in conjunction with the Ignition Mesrich License Agreement, Howsam, through GFT-Ignition, purported to enter into an NOA agreement with Mesrich, which appeared to assign the payment of a Minimum Guarantee in the amount of $450,000 by Mesrich, to Comerica ("Ignition Mesrich NOA") (the Ignition Mesrich License Agreement and the Ignition Mesrich NOA shall hereafter be collectively referred to as the "Ignition Mesrich Distribution Agreements"). The Ignition Mesrich Distribution Agreements were forged since they were not signed by a Mesrich representative authorized to sign on behalf of Mesrich.

FIRST CAUSE OF ACTION – BREACH OF WRITTEN CONTRACT

(Against the Howsam Parties and DOES 1-10)

94. Comerica incorporates paragraphs 1-93 above as though fully set forth herein.

95. For each of the Films, Howsam signed an LSA, an Interparty Agreement, and a Sales Agency Agreement. The LSAs provide the terms under which Comerica loaned

money to the Howsam Parties, and the Interparty Agreements and Sales Agency Agreements provide the order in which the parties involved in producing each of the films will get paid upon delivery of the films.

96. Pursuant to the express terms of the LSAs and the Interparty Agreements, the Howsam Parties agreed to provide valid, enforceable Distribution Agreements and NOAs. Furthermore, pursuant to the terms of the Interparty Agreements and the Sales Agency Agreements, the Howsam Parties agreed that Comerica's loans would be repaid before any other parties claiming an interest in revenue derived from the Films, including, without limitation, revenue from the Minimum Guarantees.

97. In breach of the terms of the LSA for each Film, the Howsam Parties failed to deliver duly executed Distribution Agreements and/or executed NOAs to Comerica. Instead, the Howsam Parties delivered ***forged or counterfeit*** Distribution Agreements and NOAs. Additionally, in breach of the Interparty Agreements and Sales Agency Agreements, Comerica is informed and believes that the Howsam Parties were, and are, making payments to third parties out of revenue derived from the Films, which should have been paid to Comerica.

98. In making its decision to loan the money for each of the Films, Comerica relied upon the forged documents provided to it by the Howsam Parties. However, because the distributors whose signatures were forged or counterfeited never actually purchased the distribution rights to the Films, and never executed the NOAs or related documents, as described above, those distributors never paid Comerica after each of the films was produced and delivered. As a result, more than $20 Million owed to Comerica

by the Howsam Parties was never paid, and Comerica has been damaged by at least that total amount.

99. Comerica has fully performed its duties and obligations under the LSAs and Interparty Agreements, except to the extent it was excused or prevented from doing so by the acts and omissions of the Howsam Parties.

100. In addition, the LSAs, Interparty Agreements, and Sales Agency Agreements contain an implied agreement that each party will conduct itself in good faith and will deal fairly with the other, and, further, that neither party will interfere with or deprive the other of the benefits of the LSAs, Interparty Agreements, and Sales Agency Agreements. Pursuant to those implied covenants, the Howsam Parties had a duty to conduct themselves in accordance with those agreements and not to engage in any action which would deprive Comerica of the benefit of those agreements. Comerica entered into the LSAs and Interparty Agreements, with the understanding and expectation that it would be paid back in full, and in a timely fashion, according to the express terms of the LSAs and Interparty Agreements, and that each loan was fully secured by the License Agreements and related NOAs. Furthermore, as a third party beneficiary of the Sales Agency Agreements, Comerica was entitled to be repaid from revenue derived by each film before any other interested party.

101. By engaging in the acts and omissions alleged herein, the Howsam Parties have breached the covenants of good faith and fair dealing owed to Comerica pursuant to the LSAs, Interparty Agreements, and Sales Agency Agreements, and have acted in bad faith by failing and

refusing, without justification, to perform their duties and obligations under those agreements.

102. On information and belief, Comerica alleges that the Howsam Parties have pursued this course of conduct in bad faith and with the intent to interfere with, injure and frustrate Comerica's enjoyment of the benefits and rights conferred under the terms of the LSAs and Interparty Agreements. Even if the conduct alleged above were adjudged not to amount to a formal breach of the contracts between Comerica and the Howsam Parties, the actions of the Howsam Parties have deprived Comerica of the benefit it sought in entering into the LSAs and Interparty Agreements, and the various other associated agreements.

103. As a direct and proximate result of the aforesaid acts and omissions of the Howsam Parties, Comerica has incurred damages in excess of $20 Million.

104. Pursuant to the LSAs and Interparty Agreements, Comerica is also entitled to recovery of its reasonable attorney's fees incurred in connection with enforcement of its rights under each LSA and Interparty Agreement.

SECOND CAUSE OF ACTION – FRAUD AND DECEIT

(Against the Howsam Parties, Glockler, Bennecke, and DOES 11-35)

105. Comerica incorporates paragraphs 1-93 above as though fully set forth herein.

106. As a material inducement to Comerica to enter into the LSAs and Interparty Agreements, and to lend

money to the Howsam Parties for the production of the Films, the Howsam Parties, Glockler, and Does 11-35, and each of them, represented to Comerica, among other things, that they had sold distribution rights to the various distributors identified above, and had obtained License Agreements and NOAs from those distributors to whom distribution rights had been sold.

107. The true facts, of which Comerica was unaware, were that the Howsam Parties had *not* sold the distribution rights to those distributors, and the distributors had not signed NOAs or License Agreements. Instead, the Howsam Parties, with the assistance of Glockler and Bennecke, delivered forged or counterfeit NOAs to Comerica, upon which Comerica relied in agreeing to lend money to the Howsam Parties to produce the Films.

108. Comerica is further informed and believes, and based thereon alleges, that Howsam and various Does, purposefully and intentionally directed and controlled the Howsam Parties, Glockler, and others, and that those Defendants made the aforesaid false representations with the intent to deceive and induce Comerica to enter into the LSAs and Interparty Agreements, and to loan significantly more money to the Howsam Parties than was actually secured by pre-sales of distribution rights, and significantly more money than was actually necessary to produce the Films.

109. Upon information and belief, Comerica alleges that Bennecke falsely represented to Comerica that he had received, on Comerica's behalf, legitimate License Agreements and NOAs when in fact he had not, and knew that the License Agreements and NOAs identified herein were false and/or forged. Comerica would not have entered into

the LSAs and Interparty Agreements, or have otherwise agreed to loan money to the Howsam Parties with respect to the Films had Comerica known the true facts alleged herein.

110. Furthermore, Comerica is informed and believes that Glockler was responsible for creating and/or obtaining forged and/or counterfeit signatures on the License Agreements and NOAs identified herein. Comerica is informed and believes that Glockler did so on behalf of the Howsam Defendants and at their behest with the intent to defraud Comerica.

111. As a direct and proximate result of the fraudulent representations of the Howsam Parties, Bennecke, Glockler, and others, Comerica has incurred damages in excess of $20 Million. The full nature and extent of these damages, and of the Defendants' fraudulent acts, are presently unknown.

112. On information and belief, Comerica alleges that the Howsam Parties, Bennecke, Glockler, and various Does, and each of them, in doing the things herein alleged, acted willfully, maliciously, oppressively and with full knowledge of the adverse effect of their actions on Comerica, and with willful and deliberate disregard to the consequences to Comerica. As a direct result of the fraudulent, willful and malicious conduct of the Howsam Parties, Bennecke, Glockler, and various Does, and each of them, Comerica is entitled to exemplary and punitive damages against the Howsam Parties in an amount to be determined as appropriate by the trier of fact.

THIRD CAUSE OF ACTION – CONSPIRACY TO DEFRAUD

(Against the Howsam Parties, Bennecke, Glockler, and DOES 11-50)

113. Comerica incorporates paragraphs 1-93, and 106-112 above as though fully set forth herein.

114. Comerica alleges on information and belief that Bennecke, Glockler, the Howsam Parties, and Does 11-50 engaged in a conspiracy to defraud Comerica as described above, and that these defendants reached implicit or explicit agreements with each other to aid in defrauding Comerica. In furtherance of their agreements, these defendants committed the fraud described herein.

115. As a direct and proximate result of the fraudulent representations of the Howsam Parties, Bennecke, and Glockler, Comerica has incurred damages in excess of $20 Million. The full nature and extent of these damages, and of Defendants' fraudulent acts, is presently unknown.

116. On information and belief, Comerica alleges that the Howsam Parties, Bennecke, and various Does, and each of them, in doing the things herein alleged, acted willfully, maliciously, oppressively and with full knowledge of the adverse effect of their actions on Comerica, and with willful and deliberate disregard to the consequences to Comerica. As a direct result of the fraudulent, willful and malicious conduct of the Howsam Parties, Bennecke, Glockler, and various Does, and each of them, Comerica is entitled to exemplary and punitive damages against the Howsam Parties, Bennecke, Glockler, and Does No. 11-50 in an amount to be determined as appropriate by the trier or fact.

FOURTH CAUSE OF ACTION – FRAUDULENT INDUCEMENT

(Against the Howsam Parties, Bennecke, Glockler, and DOES 11-50)

117. Comerica incorporates paragraphs 1-93, and 106-112 above as though fully set forth herein.

118. Comerica is informed and believes that, as a material inducement to Comerica to enter into the LSAs and associated documents, such as the Interparty Agreements, for each Film, the Howsam Parties, Glockler, and Does 11-50, and each of them, represented to Comerica, among other things, that the various License Agreements and NOAs identified herein were legitimate and valid. Furthermore, the Howsam Parties represented that the budgets provided to Comerica were true and accurate representations of the anticipated costs to produce each of the Films. These defendants knew that Comerica was relying upon their representations in entering into each of the LSAs, Interparty Agreements, and related agreements.

119. The aforesaid warranties and representations of the Howsam Parties, Glockler, and Does 11-50 were false and fraudulent. Comerica is informed and believes that Howsam and various Does purposefully and intentionally directed and controlled the Howsam Parties, Bennecke, Glockler, and various Does, and that all Defendants made the aforesaid false representations with the intent to deceive and induce Comerica to enter into the LSAs and Interparty Agreements, and to loan significantly more money that was actually required for the Howsam Parties to produce the Films.

120. Comerica reasonably relied on the warranties and representations of these defendants in agreeing to

enter into the LSAs and Interparty Agreements, and to loan the money to the Howsam Parties. Comerica would not have entered into the LSAs and Interparty Agreements, or otherwise have agreed to provide any loans to the Howsam Parties with respect to the Films, had Comerica known the true facts alleged herein.

121. As a direct and proximate result of the fraudulent representations of the Howsam Parties, Bennecke, Glockler, and Does 11-50, Comerica has incurred damages in excess of $20 Million. The full nature and extent of these damages, and of Defendants' fraudulent acts, are presently unknown.

122. On information and belief, Comerica alleges that the Howsam Parties, Bennecke, Glockler, and various Does, and each of them, in doing the things herein alleged, acted willfully, maliciously, oppressively and with full knowledge of the adverse effect of their actions on Comerica, and with willful and deliberate disregard to the consequences to Comerica. As a direct result of the fraudulent, willful and malicious conduct of the Howsam Parties, Bennecke, Glockler, and various Does, and each of them, Comerica is entitled to exemplary and punitive damages against these defendants in an amount to be determined as appropriate by the trier of fact.

FIFTH CAUSE OF ACTION – ACCOUNTING

(Against the Howsam Parties and Does 95-100)

123. Comerica incorporates paragraphs 1-93 above as though fully set forth herein.

124. As a result of the wrongful action of the Howsam Parties' and Does 95-100, Comerica has not been

paid the amounts owed it under the LSAs. As a result, Comerica is entitled to an accounting of the amount owed it by the Howsam Parties.

125. Additionally, pursuant to the LSAs, the Howsam Parties agreed to provide Comerica with an accurate budget and/or agreed to deliver specific movies with final approved budgets equal to or exceeding various specified amounts.

126. Comerica is informed and believes that these defendants have failed and refused to provide Comerica with an accurate budget for each of the Films. By reason of, inter alia, the Howsam Parties' complete dominion and control over the production and budget of the Films and including all amounts to be allegedly expended in the production of the Films, and the preparation, accounting for and payment of all items on the budgets prepared by the Howsam Parties in connection with the Films, and based on the terms and conditions of the parties' agreements, Comerica is entitled to a full and accurate accounting of the budgets for each Film, and the final actual cost of each Film.

127. Furthermore, Comerica is informed and believes that the Howsam Parties have received payments for license fees from distributors that should have been paid directly to Comerica pursuant to the terms of the LSAs, Interparty Agreements, and Licence [sic] Agreements. Additionally, Comerica is informed and believes that the Howsam Parties paid money to other parties before paying off the loans to Comerica, as they were required to do under the LSAs, Interparty Agreements, and Sales Agency Agreements. As a result, Comerica is entitled to an accounting of all License Fees received from

distributors, all payments made to third parties, and any other money received or paid out prior to paying off the loans on the subject Films.

SIXTH CAUSE OF ACTION – MONEY HAD AND RECEIVED

(Against the Howsam Parties and DOES 1-10)

128. Comerica incorporates paragraphs 1-93 above as though fully set forth herein.

129. Within the last four years, the Howsam Parties became indebted to Comerica in a sum in excess of $20 million for money had and received by said Defendants for the use and benefit of Comerica.

130. The whole of the above sum has not been paid, although demand therefor has been made.

131. There is not due, owing and unpaid from the Howsam Parties to Comerica the sum of not less than $20 million, together with interest as may be provided by law.

SEVENTH CAUSE OF ACTION – ACCOUNT STATED

(Against the Howsam Parties and DOES 1-10)

132. Comerica incorporates paragraphs 1-93 above as though fully set forth herein.

133. Within the last four years, an account was stated by and between Comerica and the Howsam Parties in which it was agreed and understood that said Defendants were indebted to Comerica in a sum in excess of $20 million.

134. The whole of the above sum has not been paid, although demand therefor has been made.

135. There is not due, owing and unpaid from the Howsam Parties to Comerica the sum of not less than $20 million, together with interest as may be provided by law.

EIGHTH CAUSE OF ACTION – OPEN BOOK ACCOUNT

(Against the Howsam Parties and DOES 1-10)

136. Comerica incorporates paragraphs 1-93 above as though fully set forth herein.

137. Within the last four years, the Howsam Parties became indebted to Comerica on an open book account for money due in a sum in excess of $20 million for money lent at said Defendants request.

138. The whole of the above sum has not been paid, although demand therefor has been made.

139. There is not due, owing and unpaid from the Howsam Parties to Comerica the sum of not less than $20 million, together with interest as may be provided by law.

PRAYER FOR RELIEF

WHEREFORE, Comerica prays for judgment against all defendants in this action, jointly and severally, as follows:

AS TO THE FIRST CAUSE OF ACTION:

1. For general damages in a sum of not less than $20,000,000 or an amount according to proof, together with interest thereon at the legal rate;

2. Attorney's fees and costs;

AS TO THE SECOND CAUSE OF ACTION:

3. For general damages in a sum of not less than $20,000,000 or an amount according to proof, together with interest thereon at the legal rate;

4. Exemplary and punitive damages in an amount according to proof at the time of trial;

AS TO THE THIRD CAUSE OF ACTION:

5. For general damages in a sum of not less than $20,000,000, or an amount according to proof, together with interest thereon at the legal rate;

6. Exemplary and punitive damages in an amount according to proof at the time of trial;

AS TO THE FOURTH CAUSE OF ACTION:

7. For general damages in a sum of not less than $20,000,000, or an amount according to proof, together with interest thereon at the legal rate;

8. Exemplary and punitive damages in an amount according to proof at the time of trial;

AS TO THE FIFTH CAUSE OF ACTION:

9. For an accounting of the actual budgets and costs of each of the Films;

AS TO THE SIXTH CAUSE OF ACTION:

10. For damages in a sum of not less than $20,000,000 or an amount according to proof, together with interest thereon at the legal rate;

AS TO THE SEVENTH CAUSE OF ACTION:

11. For damages in a sum of not less than $20,000,000 or an amount according to proof, together with interest thereon at the legal rate;

AS TO THE EIGHTH CAUSE OF ACTION:

12. For damages in a sum of not less than $20,000,000 or an amount according to proof, together with interest thereon at the legal rate;

AS TO ALL CLAIMS FOR RELIEF:

13. For a finding of constructive trust for:

(i) the distribution rights in the territories covered by all License Agreements executed in connection with the Films;

(ii) all revenue derived from the sale of any right in the Films;

(iii) legal title to all of the Films; and

(iv) any other interest in which Comerica should rightfully hold a security interest pursuant to the LSAs and Interparty Agreements;

14. For an injunction precluding the Howsam Parties from transferring legal title during the pendency of this suit to frustrate Comerica's equitable interest in any of the foregoing items held in constructive trust;

15. For all costs of suit incurred herein;

16. For reasonable attorney's fees as may be provided by law;

17. For interest as may be provided by law; and

18. For such other and further relief, including without limitation injunctive relief, as the Court deems to be just and appropriate.

DATED: September 3, 2004

BUCHALTER, NEMER,
FIELDS & YOUNGER
A Professional Corporation

By: _____
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COMERICA BANK, a Michigan Banking Corporation

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

COMERICA BANK, a Michigan Banking Corporation,

Plaintiff,

vs.

GARY HOWSAM, an individual; GFT ENTERTAINMENT, INC., and Ontario corporation, also known as GFTE, INC., and previously known as GREENLIGHT FILM AND TELEVISION, INC. D/B/A GFT ENTERTAINMENT; PEACE ARCH ENTERTAINMENT GROUP, INC., an Ontario Corporation; GFT CIRCLE FILMS, INC., an Ontario Corporation; ROAD RAGE FILMS, INC.,

CASE NO. BC316406

OPPOSITION OF COMERICA BANK TO MOTION OF DEFENDANTS GARY HOWSAM AND GREENLIGHT FILM AND TELEVISION, INC. TO QUASH SERVICE OF SUMMONS FOR LACK OF PERSONAL JURISDICTION

[Declarations of Robert S. Addison, Jr., Carmen E. Carpenter, and G. Raymond F. Gross submitted herewith.]

a Corporation of unknown origin; JANUS PRODUCTIONS, INC., a Quebec Corporation; GFT GOING BACK FILMS, INC., an Ontario Corporation; GFT HERESY FILMS, INC., an Ontario Corporation; GFT/REDWOOD KOTN FILMS, INC., a British Columbia Corporation; GFT/REDWOOD IGNITION FILMS, INC., a British Columbia Corporation; ADAM BENNECKE, an individual; MICHEL GLOCKLER, an individual; and DOES 1 through 100, inclusive, Defendants.	Date: December 15, 2004 Time: 8:30 a.m. Dept: 31 Judge: Hon. Andria K. Richey

I. INTRODUCTION AND SUMMARY OF OPPOSITION

Despite their extensive and purposeful contacts with this State in furtherance of a major fraud scheme aimed at Comerica Bank ("Comerica"), defendants Greenlight Film and Television, Inc., D/B/A GFT Entertainment ("Greenlight") and Gary Howsam ("Howsam") both move this Court to quash service of summons for lack of personal jurisdiction. The Motions of Howsam and Greenlight should be denied because this Court has jurisdiction over these two defendants based on the following:

1. Howsam and Greenlight had sufficient contacts with California to justify the exercise of personal jurisdiction;

2. Howsam and Greenlight consented to California jurisdiction; and

3. California has a compelling interest in this action.

In the event that the Court finds insufficient evidence contained within this Opposition, Comerica is entitled to conduct discovery for the purpose of obtaining support for its Opposition.

II. FACTUAL BACKGROUND

A. Howsam Came to California to Obtain Financing From a California Bank.

In 1999 and 2000, Howsam used his company, Greenlight, to seek out and fraudulently obtain film financing from Comerica Bank-California, a California banking corporation.[1] In connection with his fraud scheme, Howsam, both individually and as an officer of Greenlight, personally came to California numerous times to negotiate financing with Comerica for a number of films he planned to produce through Greenlight, including *Deception, Going Back, Kevin of the North, Global Heresy, The Circle, Road Rage* and *Ignition* (collectively, the "Films"). [Declaration of G. Raymond F. Gross (the "Gross Decl."), ¶¶ 3 and 4; Declaration of Carmen E. Carpenter ("Carpenter Decl."), ¶¶ 1-4, and 7.]

The loans, amounting to over $37 million, were negotiated by Howsam in *California*, and were funded

[1] Plaintiff Comerica, a Michigan banking corporation, is the successor in interest to Comerica Bank, a California corporation. [Carpenter Decl. ¶ 4.]

through single purpose corporate entities (the "SPEs"), which were established and controlled by Howsam and Greenlight. [Carpenter Decl., ¶¶ 8-10, Exs. A-N; Gross Decl., ¶¶ 3-4.] Performance of the loan agreements was also due in California. [Carpenter Decl., ¶ 10, Ex's. A-G.] Furthermore, Howsam and Greenlight continue to do business in California, even as recently as November, 2004, when Howsam's successor company to Greenlight, GFT Entertainment, Inc. ("GFT"), was in Santa Monica marketing its films. [Declaration of Robert S. Addison, Jr. ("Addison Decl."), ¶¶ 11 and 12 and Ex's A, K, and M.]

B. Comerica's Borrowers (the SPEs) Are Howsam And Greenlight's Alter Ego Corporations, And Have Consented To California Jurisdiction.

When Howsam first approached Comerica, and during the entire business relationship thereafter, he presented himself as a movie producer seeking financing for a number of films. [Carpenter Decl., ¶ 5.] Typically, when Comerica provides film financing, the producer/borrower provides licensing agreements and an assignment of the minimum guaranteed licensing fees to be paid by distributors, as collateral for the loans. [Carpenter Decl., ¶¶ 8-10.] In connection with the production and financing of films, single purpose corporate entities are created as shell corporations, which become the technical borrowers for each of the subject loans; that is what occurred in this case. [Carpenter Decl., ¶¶ 8-10.]

Howsam personally came to California and negotiated with Comerica personnel, here in Los Angeles, to obtain financing for the Films, which he was producing through his company, Greenlight. [Gross Decl., ¶¶ 3-4; Carpenter

Decl., ¶¶ 1-4, and 7.] During this negotiation process, Howsam and Greenlight created the SPEs – one entity for each of the Films – which were controlled by Howsam and Greenlight. [Carpenter Decl., ¶¶ 8-9.] In fact, Howsam personally signed all the loan documents on behalf of the SPEs, including the Loan and Security Agreements ("LSAs"), which provide that the parties consent to the application of California law, to jurisdiction in this State, and to venue in this Court. [*See* ¶¶ 10.4 and 10.7 of the LSA's, attached as Ex's A through G to the Carpenter Decl.]

Each of the SPEs was owned by Greenlight, or by another corporate entity of which Howsam was the owner and/or officer. [*See*, Carpenter Decl., ¶ 9, Exs. H-N.] Moreover, the SPEs were virtually non-capitalized: for example, GFT Heresy issued a total of ten shares, which were purchased by Greenlight for ten cents per share, for a total of $1. [Carpenter Decl., ¶ 9, Ex. J.] GFT-KOTN and GFT-Ignition each issued 101 shares at ten cents per share and, in both cases, 100 of the shares were purchased by Greenlight (49 shares) and Redwood Films, Inc. (51 shares), both of which are Howsam controlled entities. [Carpenter Decl., ¶ 9, Exs. L, N.]

C. Howsam and Greenlight Committed Fraud By Providing Falsified Loan Collateral to Comerica.

Although the SPEs were the technical borrowers on the Comerica loans, Comerica only funded the loans to the SPEs based on the collateral provided by Howsam and Greenlight, all of which turned out to have been forged by Howsam or at his direction. [Carpenter Decl., ¶ 11-19; Addison Decl., ¶ 13, and Ex's N and O.] Specifically,

Notices of Assignment of licensing fees ("NOAs") were delivered to Comerica, by Howsam and Greenlight, which contained forged signatures. [Carpenter Decl., ¶¶ 14-15; Addison Decl., ¶ 13, Ex's N and O.] As part of its ongoing investigation into this matter, Comerica has obtained declarations by foreign distributors, in which the distributors testify that their signatures were forged on NOAs and other agreements. [Addison Decl. ¶ 13, Ex's N and O.] This forgery and falsification of collateral occurred in California and was clearly directed at a California bank.

Pursuant to the Sales Agency Agreements and the Interparty Agreements, executed by Howsam, the SPEs must pay Comerica before any other creditor, including Hilltop's Harel Goldstein, the sales agent for the Films is paid. [Carpenter Decl., Exs. O-U.] Instead of honoring these agreements, however, prior to the full repayment of Comerica's loans Howsam and Greenlight misused SPE funds that were due to Comerica, by wiring at least $57,000 from the SPEs and GFT to Carole Goldstein (Harel Goldstein's wife), who had no connection to the Films. [Addison Decl., ¶¶ 14 and 15, Ex. P.]

D. GFT Entertainment Inc. Is A Mere Continuation Of Greenlight's Film Production Business, Under a New Name.

In December 2002, the movie business of Greenlight (d/b/a GFT Entertainment) became GFT Entertainment Inc. ("GFT"). [*See* Addison Decl. ¶¶ 3-10, Ex's B through I.] GFT continued to share the same address as Greenlight, at 124 Merton Street, Suite 407 in Toronto, Canada, and, as late as November, 2004, GFT's website listed Greenlight films among its "Completed Productions," including the Films which are the subject of this action. [*See* Addison

Decl. ¶¶ 3-10, Ex's B through I.] In September 2004, GFT again changed its name, this time to Peace Arch Films, but in each case, the same individual – Howsam – is involved in selling the same Films which were financed with the same funds fraudulently obtained from Comerica. [*See* Addison Decl. ¶¶ 9 and 10, Ex's J and L.]

GFT's website, located on the internet at www.gfte.com, lists GFT's address as 124 Merton Street, Suite 407, Toronto, Ontario, Canada. [Addison Decl., ¶ 3.] On the page entitled "Completed Productions," the Films at issue in this case are listed under the heading "Greenlight Film & Television, Inc." [Addison Decl., ¶ 3.] Additionally, for each of these films is a separate web page, listing details of the film's production, including Gary Howsam as producer for all of the Films, and identifying distributors for each film. [Addison Decl., ¶ 3, Exs. B – H.]

In late October or early November 2004, counsel for GFT was informed of the content of GFT's own website by counsel for Comerica. [Addison Decl., ¶¶ 7 and 8.] On November 16, 2004, just two weeks after that conversation, the website had been changed. [Addison Decl., ¶ 9, Ex. K.] Moreover, on September 1, 2004, after the filing of the present action against GFT, GFT Entertainment, Inc. changed its name to Peace Arch Motion Pictures, Inc., and the website now reflects that new name. [Addison Decl., ¶ 9, Ex. J.] Significantly, on the "Completed Productions" website page, the Greenlight films have been removed. [Addison Decl., ¶ 9.]

III. ARGUMENT

A. This Court Previously Found Jurisdiction Over Howsam and Greenlight Under Virtually Identical Circumstances.

Significantly, the issue of the Los Angeles Superior Court's jurisdiction over Howsam and Greenlight in connection with their seeking and obtaining loans from Comerica Bank has *already been litigated and adjudicated*. In late 1999, around the time Howsam and Greenlight were in California to commence the process of defrauding Comerica of $20,000,000, the law firm of Kaye, Scholer, Fierman, Hays & Handler, LLP ("Kaye Scholer") sued Howsam and Greenlight for their failure to pay attorneys fees owed to Kaye Scholer in connection with Howsam's production of the film "*Hellcab*." [Addison Decl., ¶ 16.][1] Under circumstances similar to this case, Howsam and Greenlight hired Kaye Scholer to assist in various corporate matters and to help obtain financing for the production *Hellcab*, which was finally obtained from *Comerica Bank*. [Addison Decl., ¶ 16.]

After Howsam and Greenlight failed to pay their attorneys' fees, Kay Scholer filed suit, in response to which Howsam and Greenlight, through their attorney, Charles M. Coate (Howsam and Greenlight's present counsel), filed a motion to quash for lack of personal jurisdiction. The Los Angeles Superior Court, Department 78, the Honorable Marilyn L. Hoffman presiding, denied Howsam and Greenlight's motion to quash, and ruled that the Court

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[1] Comerica requests the Court take judicial notice of LASC Case No. BC213-970, the pleadings and records on file in that case, and the Orders issued by this Court in that case. [Addison Decl., ¶ 16, Ex. T.]

held specific jurisdiction over both defendants. [Addison Decl., ¶ 16, Ex. T.]

The circumstances of the present case are substantively no different from the Kaye Scholer case. In fact, Howsam and Greenlight's motion in the present case is virtually identical to the motion filed in the Kaye Sholer case. It is indisputable that, in the late 1990's and early 2000's, Howsam and Greenlight were active in California, doing business with California law firms, and obtaining film financing from Comerica, a California bank. [*Carpenter* Decl., ¶¶ 5-7.] This Court previously held Howsam and Greenlight subject to its jurisdiction in connection with disputes arising out of Howsam and Greenlight's California-related business, and the Court should once again rule the same.

B. Howsam And Greenlight Had Sufficient Contacts With California To Justify This Court's Exercise Of Personal Jurisdiction.

California courts may exercise personal jurisdiction over nonresident defendants "on any basis not inconsistent with the Constitution of this state or of the United States." (Code Civ. Proc., § 410.10.) California's "long-arm" statute "manifests an intent to exercise the broadest possible jurisdiction, limited only by constitutional considerations." (*Sibley v. Super. Ct.*, 16 Cal. 3d 442, 445 (1976) (emphasis added).)

Under the federal Constitutional standards, a state court's assertion of specific personal jurisdiction over a nonresident defendant who has not been served with process within the state requires that the defendant has sufficient "minimum contacts" with the forum such that

"maintenance of the suit does not offend traditional notions of fair play and substantial justice." (*Internat. Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citations omitted); *Vons Companies, Inc. v. Seabest Foods, Inc.*, 14 Cal. 4th 434, 445 (1996).) Specific jurisdiction is determined under a three-part test:

(1) the defendant has purposefully availed itself of forum benefits with respect to the matter in controversy;

(2) the controversy is related to or arises out of the defendant's contacts with the forum; and,

(3) the exercise of jurisdiction would not offend traditional notions of fair play and substantial justice.

(*Archdiocese of Milwaukee v. Super. Ct.*, 112 Cal. App. 4th 423, 435-436 (2003).) All three criteria are met in this case.

1. Howsam And Greenlight Purposefully Availed Themselves Of California Benefits.

Nonresident defendants are subject to specific jurisdiction if, by their forum-related contacts, they: (1) purposefully direct activities at forum residents; (2) purposefully derive benefit from forum activities; or (3) purposefully avail themselves of the privilege of conducting activities with the forum state, thus invoking the benefits and protections of its laws. (*See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-475 (1985).) Howsam and Greenlight's activities in California satisfy all three purposeful availment formulations.

a. Howsam And Greenlight Engaged In Intentional Wrongful Conduct Targeting A California Bank.

Under the "effects test," California courts will determine that a defendant has purposefully availed of forum benefits if the defendant engaged in intentional conduct expressly aimed at or targeting the forum state, and the defendant knew the intentional conduct would cause harm in the forum. (*Archdiocese of Milwaukee*, 112 Cal. App. 4th at 436-437.) "The substantial connection between the defendant and the forum state necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State." (*Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (citations omitted).) In fact, jurisdiction exists even if the non-resident has not otherwise invoked the benefits and protections of local law. (*See Jamshid-Negad v. Kessler*, 15 Cal. App. 4th 1704, 1708-1709 (1993).)

Here, the evidence clearly supports jurisdiction over both Howsam and Greenlight, due to their purposeful activity aimed at causing harm to Comerica in California. In connection with the loans at issue in this case, Howsam, the *President* of Greenlight, sought out and obtained the loans from Comerica, a California bank, and met with Comerica personnel on many occasions *in California*. [Gross Decl., ¶¶ 3 and 4; Carpenter Decl., ¶¶ 5-7.] Howsam, acting individually and on behalf of Greenlight, presented forged and false collateral to Comerica, *in California*, in order to induce Comerica into funding the loans, of which Howsam and Greenlight obtained the benefit. In addition, Howsam worked intimately with Hilltop Entertainment, LLC, a California company, and its employees and agents, all California residents, to market

and sell the Films. [Gross Decl., ¶¶ 3 and 4; Carpenter Decl., ¶¶ 5-7.] Howsam also signed the loan documents for the subject loans, purportedly on behalf of the SPEs, which were established by Howsam and wholly owned by Greenlight. [Carpenter Decl., ¶ 10.]

b. Howsam And Greenlight Obtained The Benefit Of The Loan Contracts Which Were Negotiated in California.

Although the loans were funded to the SPEs, Howsam and Greenlight obtained the clear benefit of the fraudulently obtained loans and, as such, purposefully availed of California benefits. (*See Burger King Corp.*, 471 U.S. at 475.) All of the SPEs were established to finance the Films and were fully controlled by Howsam and Greenlight. [*Carpenter* Decl. ¶¶ 8-10, Exs. H-N.] Howsam and Greenlight's subsequent marketing efforts were assisted by Hilltop's Harel Goldstein, a California sales agent, and Howsam, both individually and as President of Greenlight, earned a significant amount of money and enhanced his professional reputation by getting the Films made. [Gross Decl., ¶ 4.] In addition, the SPEs were required by the loan agreements to pay Comerica before any other creditor, including Mr. Goldstein. [Carpenter Decl., ¶ 10, Exs. A-G.] Instead of honoring these agreements, however, Howsam and Greenlight misused SPE funds that were due to Comerica. [Addison Decl., ¶ 14.] In 2001, prior to the full repayment of the Comerica loans, Howsam and Greenlight wired at least $57,000 from the SPEs to Carole Bennett Goldstein (Harel Goldstein's wife), who was not hired by Howsam, Greenlight, or the SPEs and, in fact, who had no connection whatsoever to the films. [Addison Decl., ¶ 14 and 15, Ex. P.]

Howsam and Greenlight continue to market and benefit from the Films, and thus there can be no dispute but that Howsam and Greenlight purposefully derived benefit from their contacts with California and from the fraud scheme that they devised and executed here against Comerica.

c. Howsam And Greenlight Negotiated The Loan Contracts In California, Thereby Invoking The Benefits And Protections Of California Law.

Howsam and Greenlight engaged in repeated acts which both California and federal courts have expressly held are sufficient to satisfy the minimum contacts requirements. Specifically, the United States Supreme Court has held that entering into a single contract in the California may subject the contracting party to California jurisdiction. (*McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957).) In *McGee*, the Court held that a single life insurance policy issued to a California resident, and the subsequent collection of premiums on that policy, was enough to support a California court's jurisdiction over a Texas insurer.

In the present case, Howsam and Greenlight negotiated multiple loan agreements with a California bank, *in California*, and made payments thereon, thus giving rise to California jurisdiction over them. [Carpenter Decl., ¶ 15.] In so doing, Howsam and Greenlight communicated on a regular basis with Comerica, its Los Angeles counsel, and its Los Angeles sales agent, via telephone, mail, and e-mail, regarding the details of obtaining the subject loans and the performance of those contracts. [Gross Decl., ¶¶ 3 and 4; Carpenter Decl., ¶¶ 2, 5] (*See Hall v. LaRonde*, 56

Cal. App. 4th 1324, 1344 (1997) [non-resident contacts with California resident via e-mail and telephone resulted in a contract and therefore minimum contacts].) Furthermore, *Howsam signed loan documents, which were sent to Comerica in California.* [Carpenter Decl., ¶ 10.]

The evidence in this case overwhelmingly demonstrates a pattern of activity by Howsam and Greenlight in California, which was directly related to the loans at issue in this action, and was designed to defraud a California bank. Howsam and Greenlight therefore purposefully availed themselves of California benefits and should be subject to this Court's jurisdiction in order that they may be called to account for their actions.

2. Comerica's Claims Arise From Howsam And Greenlight's Forum-Related Activities.

In applying minimum contacts analysis, courts consider those "forum-related activities as they relate to the specific causes of action." (*Gordy v. Daily News*, 95 F. 3d 829, 835 (9th Cir.1996).) "The United States Supreme Court has stated more than once that the nexus required to establish specific jurisdiction is between the defendant, the forum, and the litigation. (*Vons*, 14 Cal. 4th at 458; *citing*, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 411 (1984).)

In determining the nature of a defendant's activities in the State, California Courts inquire as to whether the quality and nature of the activity in relation to the particular cause of action make it fair to exercise jurisdiction:

> "In analyzing the defendant's activities we must focus upon 'economic reality' rather than a mechanical checklist. ***An enterprise obtains the***

> ***benefits and protection of our laws if as a matter of commercial actuality it has engaged in economic activity within this state.***"

Foster v. Mooney Aircraft Corp., 68 Cal. App. 3d 887, 892 (1977). Moreover, the Court of Appeal has clearly stated that economic activity in the State will satisfy this inquiry:

> "An ***isolated act of economic activity, such as the making and performance of a contract*** in the forum state, may be sufficient to accord the forum state jurisdiction over the defendant when the cause of action is related to that isolated act of economic activity.

(*Sanders v. CEG Corp.*, 95 Cal. App. 3d 779, 784 (1979) (emphasis added).)

Here, Howsam and Greenlight were engaged in economic activity with a California bank, obtained loans by personally negotiating with Comerica personnel *in California*, and defrauded Comerica by misrepresenting material information in connection with the loans. [Carpenter Decl., ¶¶ 10-15.] Comerica brings its claims against Howsam and Greenlight for their actions in committing this fraud and thereby obtaining millions of dollars from Comerica based on forged collateral. [Carpenter Decl., ¶¶ 14 and 15.] The loan agreements resulted from extensive contacts with California, in the negotiation and execution of the loans, and were based on forged and false collateral which was provided by Howsam and Greenlight to Comerica in this State. [Carpenter Decl., ¶¶ 5-7, 14 and 15.] Accordingly, Howsam and Greenlight are subject to this Court's personal jurisdiction because a clear and undeniable nexus exists between their economic activity in California and the resulting claims by Comerica.

3. California Has A Compelling Interest In Providing A Forum For This Action And Fairness Dictates That The Case Proceed In This State.

In extending personal jurisdiction over a non-resident entity, California courts consider additional factors to ensure that the assumption of jurisdiction "does not offend traditional notions of fair play and substantial justice":

> "We consider (1) California's interest in providing a forum for its residents to redress grievances occurring in California, (2) the relative availability of evidence in the various forums, (3) the burden of prosecuting and defending in California as opposed to prosecuting and defending the action elsewhere, (4) the opportunity to avoid a multiplicity of actions and conflicting adjudications by assuming jurisdiction, and (5) the extent to which a plaintiff's cause of action arises out of defendant's local activities."

(*Sanders*, 95 Cal. App.3d at 790.)

Clearly, California has a de facto compelling interest in preventing fraud and in providing a forum to redress Comerica's grievances. At all relevant times to this action, Comerica was a California bank in the business of financing films, an industry for which California has a well-deserved international reputation. All of Comerica's documents in connection with these loans are in California – specifically, in Comerica's Los Angeles offices – and Howsam and Greenlight, through their alter ego SPEs, have consented to jurisdiction here. [Carpenter Decl., ¶ 10, Exs. A-G.]

Howsam and Greenlight are simply wrong in their statement that it would be unreasonable to have this

matter litigated in California due to the location of witnesses and documents. On the contrary, the majority of percipient witnesses in this case are located in California, and a significant number of other witnesses are located in various countries throughout the world. There is quite simply no single location that could possibly suit the convenience of all witnesses, and Howsam and Greenlight's point is therefore unavailing.

By conducting this litigation in California, Comerica can avoid a multiplicity of suits against individuals and entities located in different regions of the United States and Canada. More importantly, this case arises from Howsam and Greenlight's own direct activities within this State, which activities were aimed at harming a California bank and involved repeated contacts with California, and this State therefore has an interest in providing a forum to litigate all matters directly related to those activities. [Carpenter Decl., ¶¶ 2-5.]

C. Howsam and Greenlight Have Consented to California Jurisdiction Through Their Alter Egos – the SPEs.

In connection with the loans, single purpose corporate entities (the "SPEs") were created and controlled by Howsam and Greenlight to act as borrowers. These SPEs should each be disregarded as corporate entities to the extent that they were used by Howsam and Greenlight for the illegitimate purpose of defrauding Comerica. Under the "alter ego doctrine," California courts will disregard a corporate entity in order to exercise jurisdiction over an individual where the corporation is "used to accomplish a fraudulent object." (*First Western Bank & Trust Co. v. Bookasta*, 267 Cal. App. 2d 910, 914 (1968).)

Comerica is suing the parties in this case based upon the Loan and Security Agreements and other loan documents entered into between Comerica and the SPEs. The Loan and Security Agreements expressly provide that California law governs disputes related thereto, that California has jurisdiction over such disputes, and that Los Angeles Superior Court is the proper venue for such disputes. [*Carpenter* Decl., Exs. A-G.] Furthermore, Howsam himself signed the Loan and Security Agreements, purportedly on behalf of the SPEs, and both he and Greenlight furnished fraudulent collateral to induce Comerica to enter those agreements and fund the loans to the SPEs. [*Carpenter* Decl., ¶¶ 10, 14 and 15, and Exs. A-G.]

1. There Was A Unity Of Interest And Ownership Between Howsam, Greenlight And The SPEs.

"There is no litmus test to determine when the corporate veil will be pierced; rather the result will depend on the circumstances of each particular case." (*Mesler v. Bragg Management Co.*, 39 Cal. 3d 290, 300 (1985).) Two sets of circumstances must generally exist, however, for the alter ego doctrine to apply: first, the corporation must be influenced and governed by the individual such that there is "a unity of interest and ownership" between the individual and the entity and their "separateness" has ceased; second, "the facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice." (*Minifie v. Rowley*, 187 Cal. 481, 487 (1921).)

Here, a clear unity of ownership existed between Howsam, Greenlight and the SPEs. Each of the SPEs was

controlled by Howsam and Greenlight and all were virtually non-capitalized: for example, GFT Heresy issued a total of ten shares, which were purchased by Greenlight for ten cents per share, for a total of $1. [*Carpenter* Decl., Ex. J.] GFT-KOTN and GFT-Ignition each issued 101 shares at ten cents per share and, in both cases, 100 of the shares were purchased by Greenlight (49 shares) and Redwood Films, Inc. (51 shares), both of which are Howsam controlled entities. [*See*, Carpenter Decl., ¶ 9, Exs. L, N.] Howsam and Greenlight established the SPEs for the sole purpose of obtaining the loans by fraudulent means and Howsam personally signed all the loan documents on behalf of the SPEs, including the Loan and Security Agreements. [*See*, Carpenter Decl., ¶¶ 10, 14 and 15.]

Howsam and Greenlight conducted all the negotiations for the loans, and established and fully controlled the SPEs, which were the technical borrowers. [*Carpenter* Decl., ¶¶ 5-9.] Moreover, the SPEs had no assets beyond the Films and the rights to the Films, all of which are now controlled by Howsam, Greenlight and their successors, who continue to obtain the full benefit of the Films. [Carpenter Decl., ¶ 9.] In fact, the "separate" entities only qualified for the film financing loans based on the forged and false collateral that was intentionally provided to Comerica by Howsam and Greenlight. [Carpenter Decl., ¶¶ 14-18.] In further demonstration of their total dominance of the SPEs and their sheer disregard of the obligations of the SPEs under the loan contracts, Howsam and Greenlight misused SPE funds in 2001, by wiring money to Carole Goldstein, the wife of Hilltop's Harel Goldstein, who had no discernable connection to the Films. [Addison Decl., ¶ 14.] The SPEs are therefore inseparable from

Howsam and Greenlight for the purposes of their obligations under the Loan and Security Agreements.

2. An Inequitable Result Will Follow If Howsam And Greenlight Are Not Bound To The Terms Of The Loan and Security Agreements.

The policy behind the alter ego doctrine seeks to hold individuals to account for their wrongful acts, even though those acts were ostensibly done in the corporation's name:

> "The alter ego doctrine arises when a plaintiff comes into court claiming that an opposing party is using the corporate form unjustly and in derogation of the plaintiff's interests. [. . .] ***As the separate personality of the corporation is a statutory privilege, it must be used for legitimate business purposes and must not be perverted. When it is abused it will be disregarded and the corporation looked at as a collection or association of individuals, so that the corporation will be liable for acts of the stockholders or the stockholders liable for acts done in the name of the corporation.***"

(*Minifie*, 187 Cal. at 487, (emphasis added) (internal citations and quotations omitted).)

In this case, the SPEs were not in reality "separate" entities, but were established and controlled exclusively by Howsam and Greenlight for the purpose of defrauding Comerica. Even if the SPEs are deemed legitimate corporations, however, this Court should nonetheless disregard the "separateness" of the SPEs to the extent necessary to bind Howsam and Greenlight to the terms of the Loan and Security Agreements that were signed by Howsam. (*See Automotriz etc. de California v. Resnick*, 47 Cal. 2d 792,

796 (1957) [California courts will disregard the "separateness" of corporate entities where the shareholder is using the corporations for an illegitimate purpose and "an inequitable result will follow" if the acts of the individual shareholder are treated as those of the corporation alone].)

The Loan and Security Agreements were only entered into by Comerica in reliance on the forged collateral *that Howsam and Greenlight provided*. [Carpenter Decl., ¶ 14.] Thus there can be no doubt that an inequitable result will follow if Howsam and Greenlight are allowed simultaneously to bind the SPEs to jurisdiction in California, by means their own fraud, and still evade such jurisdiction themselves. Permitting Howsam and Greenlight to evade their responsibility in this way would clearly sanction fraud and promote injustice, and this court should not countenance such a result.

D. Comerica Is Entitled to Conduct Discovery To Establish Minimum Contacts.

Although Comerica has presented a substantial amount of proof of Howsam and Greenlight's minimum contacts with California, there are other witnesses, including these defendants, who have knowledge of their activities in California. Furthermore, these defendants created a complex series corporate creation and re-creation, evidence of which is in their possession. Therefore, to the extent that this Court feels Comerica has not provided sufficient proof that Howsam and Greenlight engaged in sufficient minimum contacts with California to warrant the exercise of personal jurisdiction, or that the claims alleged in this action arose from those activities, Comerica respectfully requests a continuance from this Court to

conduct sufficient discovery to establish minimum contacts.

"Where jurisdiction is challenged by a non-resident defendant, the burden of proof is upon the plaintiff to demonstrate that 'minimum contacts' exist between the defendant and the forum state to justify imposition of personal jurisdiction." (*Mihlon v. Super. Ct.*, 169 Cal. App. 3d 703, 710 (1985).) It is well-settled that the plaintiff is entitled to conduct discovery on the jurisdictional issues presented by a defendant's motion to quash and, if unable to complete such discovery before the hearing on the motion, is entitled to a continuance for this purpose. (*See School Dist. of Okaloosa County v. Super. Ct.* (*City of Orange*), 58 Cal. App. 4th 1126, 1131 (1997).

IV. CONCLUSION

Comerica respectfully requests that Howsam and Greenlight's Motion be denied and that these defendants be ordered to appear and respond to Comerica's First Amended Complaint.

DATED: December 3, 2004

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

COMERICA BANK, a Michigan Banking Corporation,

Plaintiff,

vs.

GARY HOWSAM, an individual; GFT ENTERTAINMENT, INC., an Ontario corporation, also known as GFTE, INC., and successor to GREENLIGHT FILM AND TELEVISION, INC. D/B/A/ GFT ENTERTAINMENT; GREENLIGHT FILM AND TELEVISION, INC. D/B/A/ GFT ENTERTAINMENT, an Ontario Corporation; GFT CIRCLE

CASE NO. BC316406

DECLARATION OF ROBERT S. ADDISON, JR. IN SUPPORT OF COMERICA'S OPPOSITIONS TO:

1. GREENLIGHT AND HOWSAM'S MOTION TO QUASH;

2. GREENLIGHT AND HOWSAM'S MOTION TO STAY OR DISMISS;

3. GFT ENTERTAINMENT'S MOTION TO QUASH; AND

4. THE SPES' MOTION TO COMPEL ARBITRATION

FILMS, INC., an Ontario Corporation; ROAD RAGE FILMS, INC., a Corporation of unknown origin; JANUS PRODUCTIONS, INC., a Quebec Corporation; GFT GOING BACKFILMS, INC., an Ontario Corporation; GFT HERESY FILMS, INC., an Ontario Corporation; GFT/REDWOOD KOTN FILMS, INC., a British Columbia Corporation; GFT/REDWOOD IGNITION FILMS, INC., a British Columbia Corporation; ADAM BENNECKE, an individual; MICHEL GLOCKLER, an individual; and DOES 1 through 100, inclusive, Defendant.	Date: December 15, 2004 Time: 8:30 a.m. Dept: 31 Judge: Hon. Andria K. Richey

DECLARATION OF ROBERT S ADDISON, JR.

I, Robert S. Addison, Jr., declare as follows:

1. I am an attorney duly licensed to practice law in the State of California, and an associate attorney with the law firm of Buchalter, Nemer, Fields & Younger, a Professional Corporation ("BNFY"), attorneys of record for Plaintiff Comerica Bank ("Comerica"). I am personally familiar with the facts set forth herein, either from my own knowledge or from my review of the files and records regarding this action. If called upon to testify in this action

as to matters set forth herein, I could and would competently testify thereto.

2. As one of the attorneys assigned to handle this litigation, I have possession, custody, supervision and control of BNFY's records and documents relating to this action. I state that the records and documents referred to in this Declaration constitute writings taken or made in the regular or ordinary course of business of BNFY at or near the time of the act, condition or event to which they relate by persons employed by BNFY who had a business duty to BNFY to accurately and completely take, make and maintain such records and documents.

GFT's Website Claims Greenlight Films As Its Own

3. On October 22, 2004, I viewed and printed a number of web pages from defendant GFT Entertainment, Inc.'s ("GFT") website, located on the internet at www.gfte.com. True and correct copies of those pages are attached hereto as Exhibits "A" through "H." The heading at the top of the web page lists GFT's address as 124 Merton Street, Suite 407, Toronto, Ontario, Canada. On the page entitled "Completed Productions," the films at issue in this case, The Circle, Deception, Global Heresy, Going Back, Ignition, Kevin of the North, and Road Rage (collectively the "Films"), are listed under the heading "Greenlight Film & Television, Inc. [See Exhibit "A."] Additionally, for each of these films is a separate web page, listing details of the film's production, including Gary Howsam as producer for all of the Films, and identifying distributors for each film. [See Exhibits "B" through "H."]

4. Also on GFT's website is a web page, as of July 1, 2004, providing a biography of Gary Howsam. A true and

correct copy of that web page is attached hereto as Exhibit "I." Notably, on that web page, GFT makes no distinction between GFT and Greenlight, when it states: "In 1997, Gary Howsam founded Greenlight Film & Television Inc. (d/b/a GFT Entertainment). As CEO of GFT, he is forging independent production partnerships with international filmmakers and financiers. Based in Toronto, the company and its affiliates develop, produce, finance and distribute feature films."

After Being Advised of the Content of GFT's Website, GFT Changed the Website, Removing the Greenlight Films

5. In late October or early November, 2004, I received a letter from James M. Kilkowski, Esq., counsel for GFT, in which Mr. Kilkowski requested that GFT be dismissed from the present action. On or about November 8, 2004, I spoke with Mr. Kilkowski by telephone. He asked me if I had read his letter and whether Comerica would be dismissing GFT from the present action. I told him I had read his letter, but that we would not be dismissing GFT because GFT is the successor entity to defendant Greenlight and is the alter ego of Gary Howsam.

6. Mr. Kilkowski stated that Greenlight was still in business, and therefore GFT could not be its successor entity. I then asked Mr. Kilkowski to name a movie that Greenlight has produced in the last few years, to which he replied that Greenlight was now in television production and no longer produced movies. I told him I was aware of that, and that is exactly the reason GFT is Greenlight's successor entity. Specifically, upon its creation, GFT

simply carried on Greenlight's movie production business, while Greenlight focused only on television production.

7. Mr. Kilkowski then asked me why I believed GFT had carried forward with Greenlight's movie business. I responded by telling him that GFT's own website listed Greenlight's prior movie productions, including the seven movies at issue in this case, as "Completed Productions," and the biographical information regarding Gary Howsam on GFT's own website did not distinguish between GFT and Greenlight. Also, I advised him that, at the time GFT was formed, Howsam was aware that Comerica had learned of the fraud involved in the seven subject films, and Comerica believes Howsam formed GFT as the successor company to Greenlight as part of a plan to shield Greenlight's and his own assets from liability in connection with that fraud.

8. Mr. Kilkowski then asked me which website I was referring to when I stated that GFT had listed Greenlight's films for sale as "Completed Productions," and I told him www.gfte.com. He said he would look into that allegation.

9. On November 16, 2004, just two weeks after my conversation with Mr. Kilkowski, I viewed the www.gfte.com website, and it had been changed. On September 1, 2004, after the filing of the present action against GFT, GFT Entertainment, Inc. changed its name to Peace Arch Motion Pictures, Inc., and the website now reflects that new name. A true and correct copy of the press release announcing the name change is attached hereto as Exhibit "J." More significantly, however, on the "Completed Productions" page, the Greenlight films have been removed. True and correct copies of printouts of

GFT's "Completed Productions" web page, viewed on November 16, 2004, is attached here to as Exhibit "K."

10. Although the six films at issue in this case have been removed from the "Completed Productions" page of GFT's website, they remain listed under the "Recent Production Credits" web page of Gary Howsam on GFT's website. A true and correct copy of that web page is attached hereto as Exhibit "L."

GFT Marketed its Films at the America Film Market in Santa Monica, California in November, 2004

11. On November 2, 2004, I viewed the website of Peace Arch Entertainment Group, Inc. ("Peace Arch"), located on the internet at www.peacearch.com. On that website was an announcement that Peace Arch would be present at the American Film Market ("AFM"), in Santa Monica, California, from November 3-10, 2004, and a listing of the films to be screened and marketed there, including *The Good Shepherd*, *Hollywood Flies*, and *The Keeper*. A true and correct copy of this web page is attached hereto as Exhibit "M." Those three films were listed on GFT's website in October, 2004, as Completed Productions, and remain listed there on GFT's new website (under GFT's new name, "Peace Arch Films"). [See Exhibits "A" and "K."]

12. On November 5, 2004, I personally went to the AFM at the Loews Hotel in Santa Monica, California, and I saw the Peace Arch suite on the seventh floor of the hotel.

Foreign Distributors Provided Declarations Proving the Forged Documents

13. In the course of our investigation into the fraud perpetration upon Comerica, attorneys in my firm spoke with foreign film distributors who claimed that their signatures on various documents, including Deal Memos, Distribution Agreements, and Notices of Assignment ("NOAs") had been forged. Those same distributors provided sworn declarations attesting to the forgeries. Attached hereto as Exhibits "N" and "O" are two such declarations. I am in possession of a [sic] four-inch binder full of additional such declarations from a the [sic] foreign distributors identified in Comerica's First Amended Complaint, who claim that their signatures were forged, and can provide the same to the Court if necessary.

GFT and GFT Borrowers Made Regular, Large Payments to Carole Goldstein, the Wife of Harel Goldstein

14. Also in the course of our investigation into the fraud perpetrated upon Comerica, and in connection with the bankruptcy filed Harel and Carole Bennett Goldstein, my firm caused bank records of Carole Goldstein to be subpoenaed from Bank of America. Among those records, are statements listing a number of large wire transfers from GFT Entertainment, GFT Circle Films, Inc., and GFT Redwood KOTN Films, Inc. to Carole Goldstein's bank account at Bank of America. These funds transfers include, among others, the following:

(a) 12,000.00 from GFT Circle Films, Inc. on April 4, 2001;

(b) 15,000.00 from GFT Circle Films, Inc. on May 9, 2001;

(c) 10,000.00 from GFT Circle Films, Inc. on June 8, 2001;

(d) 8,000.00 from GFT Redwood KOTN Films, Inc. on June 19, 2001; and,

(e) 12,500.00 from GFT Entertainment, Inc. on July 26, 2002.

15. True and correct copies of the subpoena for the above records, the Declaration of Bank of America's Custodian of Records, and the specific pages identifying the above-referenced funds transfers are attached hereto collectively as Exhibit "P."

Kaye Scholer v. Howsam and Greenlight

16. I searched the Los Angeles County Superior Court's online records and discovered that Howsam and Greenlight were sued in late 1999 by the law firm of Kaye, Scholer, Fierman, Hays & Handler, LLP ("Kaye Scholer"), LASC Case No. BC213-970, for fees allegedly owed Kaye Scholer by Howsam and Greenlight in connection with Kaye Scholer's services provided to assist Howsam and Greenlight obtain [sic] financing from Comerica Bank for the film Hellcab. In response to Kaye Scholer's Complaint, Howsam and Greenlight, through their attorney, Charles M. Coate (Howsam and Greenlight's present counsel), filed a motion to quash for lack of personal jurisdiction. True and correct copies, which I downloaded off the Court's website, of that motion, Kaye Scholer's Opposition thereto,

and the Declaration of Ronald L. Liebow in support of Kaye Scholer's Opposition, in which he testifies to Howsam and Greenlight's obtaining financing from Comerica for Hellcab, are attached hereto as Exhibits "Q" through "S," respectively. The Los Angeles Superior Court, Department 78, the Honorable Marilyn L. Hoffman presiding, denied Howsam and Greenlight's motion to quash, and ruled that the Court held specific jurisdiction over both defendants. A true and correct copy of the Court's Minute Order denying Howsam and Greenlight's Motion to Quash, which I also downloaded off of the Court's website, is attached hereto as Exhibit "T."

Potential Witnesses

17. Among the many potential witnesses who may provide testimony in this case are the following people and their respective cities of residence (this is not a complete witness list):

Mishell Glockler	Los Angeles, CA
Lynn Mooney	Los Angeles, CA
David Pasternak	Hawthorne, CA
Mark Victor	Santa Monica, CA
Michael Grais	Santa Monica, CA
Carole Goldstein	Calabasas, CA
Harel Goldstein	Calabasas, CA
G. Raymond F. Gross	Los Angeles, CA
Thomas L. Harnsberger	Los Angeles, CA
Carmen Carpenter	Los Angeles, CA
Morgan Rector	Los Angeles CA
Marco Massoni	Los Angeles, CA
Adam Bennecke	Upland CA
Nathan J. Hochman	Beverly Hills, CA
D. Jeffrey Andrick	Beverly Hills, CA

Additionally, the many foreign distributors identified in Comerica's First Amended Complaint, who are located throughout Europe and Latin America, and whose signatures were forged on the relevant loan documents, are all potential witnesses. Furthermore, huge volumes of documents and records are maintained in California by Comerica and by the California-based witnesses.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on December 3, 2004, at Los Angeles, California.

Robert S. Addison, Jr.

EXHIBIT N

DECLARATION OF SUNNY SAMTANI

I, SUNNY SAMTANI, declare as follows:

1. I am, and at all times relevant hereto have been, the Production Executive of Rapi Films, a company duly established and existing under the laws of Indonesia, with its principal place of business in Jakarta, Indonesia, and have held that position since 1990. As such, I have possession, custody, supervision and control of the files of Rapi Films. The following facts are true of my own personal knowledge except where indicated on information and belief, and as to those matters, I believe them to be true. If called upon to do so, I could and would testify competently to the truth thereof.

2. The records and documents of Rapi Films referenced herein constitute writings taken or made and maintained in the regular and ordinary course of business of Rapi Films at or near the time of the act, condition or event to which they relate by persons employed by Rapi Films who had a business duty to Rapi Films, respectively, to accurately and completely take, make and maintain such records and documents.

3. Rapi Films regularly makes records of all acts related to the contracts it enters into, including all distribution agreements, international multiple rights deal memos, license agreements, and notice of assignment agreements, at or near the time they occur. The sources of information and Method and time of preparation of the records are such that the absence of a record of a particular act, condition, or event is a trustworthy indication that it did not occur.

4. I have reviewed Rapi Films' files and records with respect to Rapi Films' relations with Hill Top Entertainment LLC ("Hilltop") prior to making this declaration.

5. At all times relevant hereto, I have been a person authorized to approve and sign contracts on behalf of Rapi Films pertaining to the acquisition of distribution rights to motion pictures and to the assignment to other parties of Rapi Films' payment obligations under those distribution rights contracts. The only other person authorized to approve and sign such agreements on behalf of Rapi Films is my colleague, Gope Samtani, who has held the title of Chief Executive Officer of Rapi Films at all times relevant hereto.

6. Rapi Films has in the past entered into motion picture distribution agreements with Hilltop. In connection with these agreements, Rapi Films has entered into various types of agreements with Hilltop, which include international multiple rights deal memos and notice of assignment agreements, I have reviewed the document entitled "AFMA International Multiple Rights Deal Memo," dated September 2, 2000, (a true and correct copy of which is attached hereto and marked as Exhibit "A"), which purports to be an agreement between Rapi Films, as distributor, and Hilltop, as licensor, pertaining to the motion picture *Global Heresy*. Neither the original nor a copy of Exhibit "A" is contained in the business record files of Rapi Films. Rapi Films did not enter into any agreement with Hilltop to purchase distribution rights pertaining to *Global Heresy*. On Exhibit "A," in the signature block for Rapi Films, is a signature that purports to be a signature that I placed on this document. I did not sign Exhibit "A" or authorize my signature to be placed on this

document, and it was not signed by any person authorized to do so on behalf of Rapi Films.

7. I have reviewed the document entitled "Notice and Acknowledgment of Assignment," dated September 2, 2000, (a true and correct copy of which is attached hereto and marked as Exhibit "B"), which purports to be an agreement between Rapi Films, as distributor, GFT Heresy Films Inc. ("GFT") as licensor, Hilltop, as agent for GFT, and Comerica Bank – California ("Comerica Bank"), pertaining to the motion picture, *Global Heresy*. Neither the original nor a copy of Exhibit "B" is contained in the business record files of Rapi Films. Rapi Films did not enter into any agreement with Hilltop to assign to Comerica Bank, Rapi Films' purported payment obligations for the purchase of motion picture distribution rights pertaining to *Global Heresy*. On page seven of Exhibit "B," in the signature block for Rapi Films, is a signature that purports to be a signature that I placed on this document. I did not sign Exhibit "B" or authorize my signature to be placed on this document, and it was not signed by any person authorized to do so on behalf of Rapi Films.

8. I have reviewed the agreement entitled "AFMA International Multiple Rights Deal Memo," dated October 17, 1999 (a true and correct copy of which is attached hereto and marked as Exhibit "C") which was entered into between Rapi Films, as distributor, and Hilltop, as licensor, through which Rapi Films purchased certain distribution rights to *Road Rage*. I did sign Exhibit "C," on behalf of Rapi Films. Exhibit "C" or a copy thereof is contained in Rapi Films' business record files. Based upon my review of Exhibits "B" and "C," it appears to me that the signature in the signature block for Rapi Films on Exhibit "B," is a

copy or forgery of the signature which I placed on Exhibit "C."

I declare under penalty of perjury under the laws of the State of California and under the laws of the United States of America that the foregoing is true and correct and that this Declaration was executed this 24th day of February, 2003, at Los Angeles, California.

/s/ Sunny Samtani
SUNNY SAMTANI

EXHIBIT O

DECLARATION OF MESRICH HOLDINGS LIMITED

We, the undersigned Mr. Andrés M. Sánchez and Mrs. Miriam E. Rivera, on behalf of I.P.S. Management Ltd., Sole Director of Mesrich Holdings Limited, declare as follows:

1) We are the directors of the company Mesrich Holdings Limited, with registered offices at P.O. Box 3175, Road Town, Tortola, British Virgin Islands.

2) We are aware of the fact that during the year 2000 Hilltop Entertainment LLC (hereinafter "Hilltop") started with our company a negotiation regarding the distribution of a movie titled "IGNITION".

This negotiation was never finalized and Mesrich Holdings Limited did not purchase, or agree to purchase from Hilltop, or from any other third party, the rights pertaining to the movie titled "IGNITION".

3) One year later Mesrich Holdings Limited received a fax (document attached hereto in copy under No 1) from GFT Entertainment showing a request for funds regarding the distribution of the movie titled "IGNITION".

Mesrich Holdings Limited replied to this request declaring that negotiation started with Hilltop terminated in July 2000 without success, and therefore there were no obligations whatsoever due by Mesrich Holdings Limited to Hilltop, nor to any third party, regarding the movie titled "IGNITION".

Copy of this document was also sent to Comerica Bank California, indicated by GFT as assignee bank, to the attention of Mrs. Carmen Carpenter, (document attached hereto in copy under No 2).

4) Thereafter Mesrich Holdings Limited never received any further document or request regarding the film titled "IGNITION", until September 2003, when a letter was sent to Mesrich Holdings Limited care of our law firm by Comerica's Bank-California solicitors (document No 3).

A copy of a Notice and Acknowledgement of Assignment was attached to said letter where a supposed signature of a representative of Mesrich Holdings Limited appears.

Mesrich Holdings Limited never entered into this agreement; our company was not even aware of the existence of this document until the letter received from the solicitors of Comerica Bank-California.

No representative of Mesrich Holdings Limited did not ever sign this document and we strongly believe that the signature on this agreement is untrue.

5) Considering the facts indicated above, we declare that Mesrich Holdings Limited did not purchase or agree to purchase any rights pertaining to the film "IGNITION", and furthermore that the signature on the Notice and Acknowledgement of Assignment is not ours or of any authorized representative of the company.

We declare under penalty of perjury under the laws of California that the foregoing is true and correct.

Executed September 25, 2003

/s/ Andrés M. Sanchez Miriam E. Rivera
Andrés M. Sánchez and Miriam E. Rivera
On behalf of I.P.S. Management Ltd.

BUCHALTER, NEMER, FIELDS & YOUNGER
A Professional Corporation
Michael L. Wachtell (SBN: 47218)
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Attorneys for Plaintiff
COMERICA BANK, a Michigan Banking Corporation

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

COMERICA BANK, a Michigan Banking Corporation,

Plaintiff,

vs.

GARY HOWSAM, an individual; GFT ENTERTAINMENT, INC., an Ontario corporation, also known as GFTE, INC., and previously known as GREENLIGHT FILM AND TELEVISION, INC. D/B/A/ GFT ENTERTAINMENT; PEACE ARCH ENTERTAINMENT GROUP, INC., an Ontario Corporation; GFT CIRCLE FILMS, INC., an Ontario Corporation; ROAD RAGE FILMS, INC., a Corporation of unknown origin; JANUS PRODUCTIONS, INC., a Quebec Corporation;

CASE NO. BC316406

DECLARATION OF CARMEN E. CARPENTER IN SUPPORT OF COMERICA'S OPPOSITIONS TO:

1. GREENLIGHT AND HOWSAM'S MOTION TO QUASH;

2. GREENLIGHT AND HOWSAM'S MOTION TO STAY OR DISMISS;

3. GFT ENTERTAINMENT'S MOTION TO QUASH; AND

4. THE SPES' MOTION TO COMPEL ARBITRATION

Date: December 15, 2004
Time: 8:30 a.m.

GFT GOING BACKFILMS, INC., an Ontario Corporation; GFT HERESY FILMS, INC., an Ontario Corporation; GFT/REDWOOD KOTN FILMS, INC., a British Columbia Corporation; GFT/REDWOOD IGNITION FILMS, INC., a British Columbia Corporation; ADAM BENNECKE, an individual; MICHEL GLOCKLER, an individual; and DOES 1 through 100, inclusive, Defendant.	Dept: 31 Judge: Hon. Andria K. Richey

DECLARATION OF CARMEN E. CARPENTER

I, Carmen E. Carpenter, declare and state as follows:

1. I am a Vice President for Comerica Bank ("Comerica"). In my capacity as Vice President, I am one of the custodians of the books, records, and files of Comerica ("Records") as they pertain to the loans made which are the subject of the action herein, including documents and copies of documents created by and/or provided to Comerica. I am thoroughly familiar with the manner in which the Records are prepared and maintained. The Records are prepared and maintained in the ordinary course of Comerica's business by duly authorized employees who have personal knowledge of the act, condition, or event being recorded and who have a business duty to so record such matters at or near the time of their occurrence. The Records are prepared in such a manner as to be thoroughly reliable. As of the date hereof, I have reviewed the Records, including those created by, and those

provided to, Comerica, as they pertain to loans made by Comerica for the production of films entitled: *The Circle, Deception, Global Heresy, Going Back, Ignition, Kevin of the North, and Road Rage* (the "Films"). As to the following facts, I know them to be true either of my own personal knowledge or have gained knowledge of them from my knowledge of Comerica's Records. If called upon to testify in this action as to the matters set forth herein, I could and would testify competently thereto.

2. In my capacity as Vice President for Comerica, I am engaged in the day-to-day management of a portfolio of clients for the Bank's entertainment group. In that regard, I am the bank officer supervising the loans made to the single purpose corporate entities, which were the borrowers of the production loans made for the Films ("GFT Borrowers" or "SPEs"). I succeeded to this position, supervising the loans made to the GFT Borrowers, in August, 2001, when my predecessor Adam Bennecke ("Bennecke") left the Bank. Prior to August, 2001, Bennecke was primarily responsible for supervising and documenting the loans with Howsam. At the time the first loan with a GFT Borrower was made, in September, 1999, I was working at Comerica. From that time until August, 2001, I observed Bennecke maintain regular contact with Gary Howsam ("Howsam") in connection with Comerica's financing of the Films. Specifically, I observed Bennecke regularly on the phone with Howsam, I saw letters and e-mails exchanged between Bennecke and Howsam, and on a number of occasions I saw Howsam in our office in Los Angeles meeting with Bennecke and others.

3. Also, during the period from 1999 to 2001, I attended regular portfolio meetings at which Bennecke was present, and during which Bennecke would provide

regular updates and reports on the loans being made by Comerica to finance the Films.

4. In approximately early 2001, Comerica Bank-California, a California Corporation, with which I was employed, merged with Imperial Bank, and became Comerica Bank-California, a California Corporation. Subsequently, Comerica Bank-California merged with Comerica Bank, a Michigan Banking Corporation, which it remains today. After the merger between Imperial Bank and Comerica Bank-California, I began working for Morgan Rector, who had come in from the Imperial Bank side. In or around March and April of 2001, Mr. Rector, Bennecke, and I met weekly to review loans, including the ones for the Films. After a short time, Mr. Rector told me that he was concerned that Bennecke had lost control over the subject loans, and he asked me to monitor the loans and take over the administration of them if necessary. Within the next few months, I occasionally engaged in communications with Howsam. In August, 2001, Bennecke left Comerica, and I became the main contact for Howsam at Comerica.

Gary Howsam and Greenlight/GFT

5. Comerica's primary contact for each of the GFT Borrowers was, and remains, Howsam, a Canadian film producer. During the time period in which the Films were financed and produced, Howsam was the president of Greenlight Film and Television, Inc. d/b/a GFT Entertainment ("Greenlight"). Based upon my conversations with Howsam during that time period, the written correspondence between Howsam and Comerica, and the fact that the names of most of the SPEs begin with "GFT,"

Howsam's film production company was primarily known to Comerica as "GFT."

6. Attached hereto as Exhibits "V" through "Z" are true and correct copies of letters and emails between GFT, Comerica, and Hilltop Entertainment, LLC. These are but a tiny sampling of the hundreds of pages of correspondence to and from Howsam related to his business dealings with Comerica in California. Letters from Gary Howsam, such at [sic] the ones attached hereto, were almost invariably on "GFT Entertainment" letterhead, and frequently addressed multiple loans and Films within a single letter.

7. During the period of time during which the Films were produced and financed, Howsam was a sizeable customer of Comerica. He sought and obtained financing for numerous films he was producing during that time, in addition to the Films at issue in this case. Also, in the process of arranging the financing for the subject loans, Comerica personnel, including Adam Bennecke, myself, and others, met personally with Howsam, spoke with Howsam on the phone on a regular basis, and exchanged extensive e-mails and written correspondence. I also attended the annual American Film Markets, held in Santa Monica, California, during that time, and saw, and sometimes met with, Howsam, who was also there.

Howsam's SPEs – The GFT Borrowers

8. Howsam controls each of the GFT Borrowers, which are:

(a) GFT Circle Films, Inc. ("GFT-Circle"), which is a single purpose entity formed for the

purpose of producing the motion picture *The Circle*;

(b) Janus Productions Inc. ("Janus"), which is a single purpose entity formed for the purpose of producing the motion picture *Deception*;

(c) GFT Heresy Films, Inc. ("GFT-Heresy"), which is a single purpose entity formed for the purpose of producing the motion picture *Global Heresy*;

(d) GFT Going Back Films, Inc. ("GFT-Going Back"), which is a single purpose entity formed for the purpose of producing the motion picture *Going Back*;

(e) GFT/Redwood Ignition Films, Inc. ("GFT-Ignition"), which is a single purpose entity formed for the purpose of producing, the motion picture *Ignition*;

(f) GFT/Redwood KOTN Films, Inc. ("GFT-KOTN"), which is a single purpose entity formed for the purpose of producing the motion picture *Kevin of the North*;

(g) Road Rage Films, Inc. ("Road Rage Films"), which is a single purpose entity formed for the purpose of producing the motion picture *Road Rage*.

9. Among the many documents required by Comerica for the loans for each Film, the corporate records detailing the formation of each SPE was provided to Comerica by Howsam. True and correct copies of those corporate records are attached hereto as Exhibits "H" through "N," respectively. Gary Howsam was the president of Greenlight, and was an officer of each of the GFT Borrowers. The majority or all of the shares in each of the GFT

Borrowers were owned by Greenlight, or by another corporate entity of which Howsam was the owner and/or officer. For example, GFT Heresy issued a total of ten shares, which were purchased by Greenlight for ten cents each. GFT-KOTN and GFT-Ignition each issued 101 shares at ten cents per share. In both cases, 100 of the shares were purchased by Greenlight (49 shares) and Redwood Films, Inc. (51 shares), both of which are Howsam controlled entities.

The Loan and Security Agreements

10. Howsam, through each of the GFT Borrowers, entered into Loan and Security Agreements with Comerica for each of the Films, as follows:

(a) On November 24, 2000, for the purposes of borrowing $1,700,000 for the production of *The Circle*, Howsam signed The Circle Loan Agreement on behalf of GFT-Circle. As security for the loan obligations, Howsam and GFT-Circle pledged all of their interest, rights and title to *The Circle* and any and all proceeds generated therefrom to Comerica.

(b) On November 27, 1999, for the purpose of borrowing up to $1,775,000 for the production of *Deception*, Howsam signed the Deception Loan Agreement on behalf of Janus. As security for the obligations under the Deception Loan Agreement, Howsam and Janus pledged all of their interest, rights and title to *Deception* and any and all proceeds generated therefrom to Comerica.

(c) On October 10, 2000, for the purposes of borrowing up to $4,425,000 for the production of *Global Heresy*, Howsam signed the Global Heresy Loan Agreement

on behalf of GFT-Heresy. As security for the loan obligations, Howsam and GFT-Heresy pledged all of their interest, rights and title to *Global Heresy* and any and all proceeds generated therefrom to Comerica.

(d) On April 7, 2000, for the purpose of borrowing up to $4,764,000 for the production of *Going Back*, Howsam signed the Going Back Loan Agreement on behalf of GFT-Going Back. As security for the obligations under the Going Back Loan Agreement, Howsam and GFT-Going Back, pledged all of their interest, rights and title to *Going Back* and any and all proceeds generated therefrom to Comerica.

(e) On June 23, 2000, for the purposes of borrowing US $12,469,121 for the production of *Ignition*, Howsam signed the Ignition Loan Agreement on behalf of GFT-Ignition. As security for the loan obligations, Howsam and GFT-Ignition pledged all of their interest, rights and title to *Ignition* and any and all proceeds generated therefrom to Comerica.

(f) On May 30, 2000, for the purposes of borrowing $10,428,000 for the production of *Kevin of the North*, Howsam signed the KOTN Loan Agreement on behalf of GFT-KOTN. As security for the KOTN Loan Agreement, Howsam and GFT-KOTN pledged all of their interest, rights and title to *Kevin of the North* and any and all proceeds generated therefrom to Comerica.

(g) On September 20, 1999, for the purposes of borrowing $1,575,000 for the production of *Road Rage*, Howsam signed the Road Rage Loan Agreement on behalf of Road Rage Films. As security for the Road Rage Loan Agreement, Howsam and Road Rage Films pledged all of

their interest, rights and title to *Road Rage* and any and all proceeds generated therefrom to Comerica.

True and correct copies of these Loan and Security Agreements are attached hereto as Exhibits "A" through "G," respectively.

COLLATERAL FOR THE GFT LOANS

11. Comerica's collateral for each of the production loans made to the GFT Borrowers was made up of, in part, assignments to Comerica of minimum guaranteed licensing fees to be paid by foreign distributors for each of the Films. Howsam and his agents were responsible for delivering executed License Agreements, Deal Memos, and Notices of Assignment ("NOAs") (collectively, the "Collateral Agreements"). The Collateral Agreements were supposed to be signed by the foreign distributor who was purchasing, in advance, the distribution rights to a given Film. By the Licensing Agreements, the distributor was guaranteeing it would pay a minimum licensing fee for the subject Film. The NOAs are absolutely critical to Comerica's decision to extend the loans because the NOAs amend and supersede the License Agreements, which are executed between the foreign distributors and the GFT Borrowers. The NOA is the document that creates a direct obligation from the distributor to Comerica. Without an NOA, there is no guarantee of payment of the license fees to Comerica, and Comerica, therefore, would not agree to extend a loan. All of the production loans to the GFT Borrowers were made within a close time-period, and Comerica generally viewed those loans collectively as related to one another.

HOWSAM HIRED HILLTOP ENTERTAINMENT, LLC AS HIS SALES AGENT FOR THE FILMS

12. As part of the process of obtaining financing for the Films from Comerica, a California bank, Howsam hired Hilltop Entertainment, LLC ("Hilltop"), a California company, as his sales agent to market the Films and obtain the Collateral Agreements on his behalf. The primary contact at Hilltop in connection with the Films and the related loans was Harel Goldstein. I have met Mr. Goldstein, and I have also met his wife, Carole Bennett Goldstein.

13. The sales agency agreement between Howsam and Hilltop was memorialized in Sales Agency Agreements between Hilltop and the GFT Borrowers, pursuant to which Hilltop was appointed as the sales agent for the purposes of entering into license agreements for exploitation of each of the Films in all territories of the world except for the United States and Canada. True and correct copies of each of the Sales Agency Agreements are attached hereto as Exhibits "O" through "U," respectively.

The Forged Collateral Agreements

14. As a condition of making a production loan to a GFT Borrower, Comerica required assignments of the GFT Borrower's right to receive the license fees from the foreign film distributors. These assignments, on which Comerica relied to make a loan to each of the GFT Borrowers, were (or were to have been) memorialized in a contractual document entitled "Notice and Acknowledgment of Assignment" ("NOA"), entered into by Comerica, Hilltop and/or the GFT Borrower, a bond company, and, purportedly, the foreign distributor for each territory in

which the Film was purportedly sold, and which were delivered to Comerica by Howsam and his agents. Comerica entered into the Loan and Security Agreements for each of the Films in specific reliance upon the NOAs provided to it by Howsam.

15. Although some of the agreed-upon license fees were paid by distributors on the subject loans, in or around the early Summer of 2001, Comerica and I began to receive, from many of the purported foreign distributors of the Films, refusals of, or questions concerning, payment request notices sent by the Bank to these foreign distributors for collection of the assigned license fees. Comerica, in seeking to clear up the confusion concerning these refusals to pay, presented to the foreign distributors, copies of the respective contracts submitted to Comerica by Hilltop and/or Howsam, and represented to the Bank as being signed by the respective foreign distributors. When presented with copies of the contract(s) with signatures attributed to them, and which had been provided to Comerica (purportedly on their respective behalf), the foreign distributors disavowed the signatures attributed to them, and/or claimed such signatures were forged. Each of these foreign distributors firmly contended that they had never reached such agreements with Hilltop to purchase the Film and/or Films purported to have been purchased by them.

Howsam's Connection to the Fraud

16. As a result of the sheer number of these forged agreements, Comerica and I began to suspect that Hilltop and its employees were involved in, or knew facts concerning, the apparent fraud committed with regard to the

Films. We then shared our suspicions with Howsam, and asked him if he knew anything about such fraud. Howsam both professed surprise at the apparent fraud, and denied knowing anything about it, including whether Harel Goldstein and/or Hilltop were involved.

17. Also in the Summer of 2001, soon after the Bank inquired of Hilltop, and raised its suspicions, concerning the validity of contracts which had been rejected by many of the foreign distributors who had purportedly bought rights in the Films, Harel Goldstein appeared at Comerica's Entertainment Group offices, where I work, in Beverly Hills, California. Harel Goldstein told Adam Bennecke and I that he understood the seriousness of the situation, but he apologized for not being able to discuss matters related to the Films and the fraud, on the grounds that he had been told by his attorneys not to discuss the facts concerning the situation with us. He then began to cry while telling us that he had children and a family.

18. In early 2003, I attended the American Film Market, in Santa Monica, California. At that time, Morgan Rector, President of the Entertainment Group, and I met with Howsam, to discuss the outstanding loan balances for the Films, owed by Howsam's SPEs, and Comerica's ongoing efforts to recover its substantial damages caused as a result of the fraud with the Films. In particular, we advised Howsam of rumors we had been hearing that Goldstein was still doing business in the film industry. Howsam responded by complaining about what a bad situation Goldstein had put him in, and how Goldstein's actions had almost cost him his business. Howsam then told us that he heard from Goldstein from time to time, who would ask him for money and would request to do business together. I found the idea of Goldstein asking

Howsam for money to be inexplicable, and inconsistent with Howsam's prior statements regarding the circumstances Goldstein put Howsam in. Howsam's SPEs, and potentially Howsam's production company, GFT Entertainment, and himself personally, were now on the hook for millions of dollars in unpaid loan balances due to forged contracts submitted during the loan process. We asked Howsam why Goldstein would be contacting calling him, asking for money, and seeking to do more business together, but Howsam could not explain why Goldstein would do so, and Howsam denied having given Goldstein any business or money since the discovery of the fraud.

19. I have since learned that Howsam and Goldstein continue to conduct film production business together, and that tens of thousands of dollars were being paid on a regular basis to Goldstein's wife by Howsam's company, GFT Entertainment, and by some of the GFT Borrowers.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Declaration is executed on December 3, 2004, in Beverly Hills, California.

Carmen Carpenter

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Attorneys for Plaintiff
COMERICA BANK, a Michigan Banking Corporation

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

COMERICA BANK, a Michigan Banking Corporation,

Plaintiff,

vs.

GARY HOWSAM, an individual; GFT ENTERTAINMENT, INC., an Ontario corporation, also known as GFTE, INC., and previously known as GREENLIGHT FILM AND TELEVISION, INC. D/B/A GFT ENTERTAINMENT; PEACE ARCH ENTERTAINMENT GROUP, INC., an Ontario Corporation; GFT CIRCLE FILMS, INC., an Ontario Corporation; ROAD RAGE FILMS, INC.,

CASE NO. BC316406

DECLARATION OF G. RAYMOND F. GROSS IN SUPPORT OF COMERICA'S OPPOSITIONS TO:

1. GREENLIGHT AND HOWSAM'S MOTION TO QUASH;

2. GREENLIGHT AND HOWSAM'S MOTION TO STAY OR DISMISS;

3. GFT ENTERTAINMENT'S MOTION TO QUASH; AND

4. THE SPES' MOTION TO COMPEL ARBITRATION

a Corporation of unknown origin; JANUS PRODUCTIONS, INC., a Quebec Corporation; GFT GOING BACK FILMS, INC., an Ontario Corporation; GFT HERESY FILMS, INC., an Ontario Corporation; GFT/REDWOOD KOTN FILMS, INC., a British Columbia Corporation; GFT/REDWOOD IGNITION FILMS, INC., a British Columbia Corporation; ADAM BENNECKE, an individual; MICHEL GLOCKLER, an individual; and DOES 1 through 100, inclusive, Defendant.	**ARBITRATION** Date: December 15, 2004 Time: 8:30 a.m. Dept: 31 Judge: Hon. Andria K. Richey

DECLARATION OF G. RAYMOND F. GROSS

I, G. Raymond F. Gross, declare as follows:

1. I am an attorney duly licensed to practice law in the State of California, and I am an attorney with the law firm of Gipson, Hoffman & Pancoine ("GHP"). I am personally familiar with the facts set forth herein, either from my own knowledge or from my review of the files and records regarding this action. If called upon to testify in this action as to matters set forth herein, I could and would competently testify thereto.

2. During the period of approximately January, 1999 to August, 2001, GHP was retained as counsel for Comerica Bank in connection with Comerica's entertainment

finance business. In the ordinary course and scope of my duties as counsel for Comerica, I was responsible for working with Comerica bank officers and Comerica's film finance customers to negotiate, document and execute loan agreements. During that process, I sometimes met in person with Comerica loan officers and Comerica's customers/borrowers.

3. From the fall of 1999 until early 2001, I met on at least five occasions, in Los Angeles, California, with Gary Howsam ("Howsam"), a movie producer who obtained film production loans from Comerica. Seven such loans were made in connection with the films entitled *The Circle*, *Deception*, *Global Heresy*, *Going Back*, *Ignition*, *Kevin of the North*, and *Road Rage* (the "Films"). In addition to the meetings I had with Mr. Howsam in California regarding the loans for the Films, I frequently spoke with Mr. Howsam by telephone, exchanged extensive e-mails and written correspondence with Mr. Howsam regarding the loans, and received necessary documentation for each loan from Mr. Howsam. During that same time period, I also worked with Howsam on other Comerica financing deals, and, on at least one occasion, in early 2000, I accompanied Mr. Howsam to the premier [sic] of one of his films (not one of the Films listed above) in Santa Monica, California.

4. In connection with the loans for the Films, I also had contacts with Harel Goldstein of Hilltop Entertainment, LLC ("Hilltop"), which was the California-based sales agent hired by Howsam's companies to market films to various distributors around the world. Since Hilltop was selling the distribution rights to the Films, and since the minimum guaranteed license fees to be paid by those distributors constituted a portion of the collateral for Comerica's loans to Howsam's companies, it was necessary

for me to communicate fairly regularly with Howsam, and, to a lesser extent, with Hilltop during the process of documenting and closing the loans for each of the Films.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on December ___, 2004, at Los Angeles, California.

G. Raymond F. Gross

Supreme Court, U.S.
FILED
SEP 27 2005
OFFICE OF THE CLERK

(3)

No. 05-229

In The
Supreme Court of the United States

GARY ~~HOWSAM,~~ a Canadian national and GREENLIGHT FILM & TELEVISION INC., an Ontario, Canada corporation,

Petitioners,

v.

SUPERIOR COURT OF THE COUNTY OF LOS ANGELES,

Respondent,

COMERICA BANK, a Michigan corporation,

Real Party In Interest.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

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REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CHARLES M. COATE, Counsel of Record, COSTA ABRAMS & COATE, LLP 1221 Second Street, Third Fl. Santa Monica, California 90401 Tel: (310) 576-6161

Counsel for Petitioners

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I. Introduction

Petitioners are not alone in decrying an arbitrary and contradictory conflating of the policies underlying the application of the alter ego doctrine with one's constitutional right of due process to be free from the unreasonable assertion of jurisdiction over one's person. Indeed, one noted commentator recently having reviewed the application of the alter ego doctrine in relation to the exercise of jurisdiction throughout the Federal Circuits and the State Courts of this country has described it as "ambiguous" and "unprincipled." Lonny S. Hoffman, The Case Against Vicarious Jurisdiction, (2004) 152 University of Pennsylvania Law Review 1023, 1081. Indeed, Professor Hoffman in his article presciently described the manner in which the instant record has unfolded: "the corporate law doctrine of veil piercing ...may be misused in a manner that produces jurisdictional determinations that are neither sound nor necessary. The line between reasoned analysis and rudderless doctrine is difficult to identify and easy to cross." (Id. at 1027). Such a line has been crossed in this case. Under the circumstances, Petitioners respectfully submit that given the arbitrary application in which the alter ego doctrine is applied in jurisdictional contexts throughout the Federal Circuits and State Courts of this Country, including by the State of California in this case, warrants the guidance of this Court in order to prevent the abusive exercise of jurisdiction by the State in an arbitrary and unconstitutional manner.

Therefore, this honorable Court should grant this petition for certiorari because it raises unique issues of jurisdiction as well as international sovereignty, comity, and conflict of laws between the United States and

Canada. Indeed, the notion of excising specific jurisdiction based solely on imputed or vicarious conduct eviscerates the jurisdictional concept of fair warning which is intended to give "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 [62 L. Ed. 2d 490, 100 S. Ct. 559] (1980). Accordingly, Petitioners respectfully request that the instant petition for certiorari be granted.

II. There Is No Evidence That Petitioners Committed Fraud in California

Comerica brazenly declares that Petitioners committed fraud in California. However, Comerica readily admits that "Petitioners did not enter into any contracts with Comerica." (Oppo. at p. 7). Rather, "consistent with [Real Party in Interest's] normal business practices, [Comerica Bank] required [Petitioners] to create the SPEs ... for each film, which entities then became the borrowers for each of the subject loans." (Oppo. at p. 5). In short, the very deal structure that was admittedly created at the behest of Comerica now serves as the basis of its novel theory that these SPEs were fraudulently conceived at conception and its corresponding alter ego theory. Comerica's direct participation in the required creation of these entities turns alter ego theory on its head and renders Comerica as a willing and knowing participant in the creation and capitalization of these entities. Yet, the State of California is a willing adherent in Comerica's novel approach to an ever expanding and elastic concept of how far the alter ego doctrine may be stretched to secure jurisdiction over an international defendant.

Despite such telling admissions on Comerica's part, it has somehow convinced the State of California to assert personal jurisdiction over Canadians that it readily admits it had no contractual privity with, nor sought. Indeed, the State of California has re-drafted the parties' agreements after the fact at the behest of this very sophisticated Plaintiff. The facts which belie the application of personal jurisdiction in violation of the due process clause of the U.S. Constitution cannot be stated more succinctly than by Comerica itself.

Indeed, the paltry evidence relied upon by Comerica distilled to its essence is that Petitioners have been to California and that 2 distribution contracts may have or appear to have been signed by others than the distributors. However, from the trial court's order denying the motion to quash it does not even appear to rely upon the inconclusive statements from said foreign distributors. Nor, does the foregoing, even if relied upon, in anyway establish jurisdiction, let alone by a preponderance of the evidence, the standard governing the instant jurisdictional question. Comerica also weakly argues on one hand that the SPEs were established by Petitioners to facilitate funding of the loans, yet on the other, readily admits that it was Comerica, not Petitioners which required such SPEs to be established. (Oppo. at p. 5). Moreover, Comerica now makes much of the purported undercapitalization of such SPEs as further evidence of the purported fraud (Oppo. at p. 6), yet readily admits that it reviewed the capitalization of each such SPE "among the many documents required by Comerica for the loans for each film," in other words before each loan was made. (Oppo. at p. 90) Clearly, capitalization or undercapitalization did not concern Comerica at the time the loans were made and it can hardly be relied upon as evidence of a fraud in the

inception when it was fully disclosed to Comerica before any funding of the subject loans occurred. Mere bluster and saber rattling cannot suffice for evidence in hailing international defendants into a U.S. Court in connection with a transaction to which they were not parties. Correspondingly, Petitioners respectfully request that the instant petition for certiorari be granted.

III. Absent Guidance from This Court, The Indeterminacy of The Alter Ego Doctrine as applied by Federal and State Courts such as California for Jurisdictional Purposes renders the Due Process Clause unreasonably and unconstitutionally vague.

For years innumerable judicial commentators have been searing in their criticism of the alter ego doctrine. "Unprincipled," Frank H. Easterbrook & Daniel R. Fischel, Limited Liability and The Corporation, 52 U. Chi. Law Review 89, 89 (1985); "defying any attempt at rational explanation," Jonathan M. Landers, A Unified Approach to Parent, Subsidiary and Affiliate Questions in Bankruptcy, 42 U. Chi. Law Review 589, 620 (1975); "dysfunctional," Steven M. Bainbridge, Abolishing Veil Piercing, 26 J. Corp. L. 479, 506 (2001); and "not entirely comprehensible" Philip I. Blumberg, The Law of Corporate Groups: Procedural Problems in the Law of Parent and Subsidiary Corporations (1983) are just some of the kind words that have been used to describe this doctrine. The formulation of the tests for veil piercing varies widely by jurisdiction, as some are based on common law, some on vague equitable standards, some on statute. For example, the leading case in California *Assoc. Vendors, Inc. v. Oakland Meat Co.*, 26 Cal. Rptr. 806, 815 (Cal. Ct. App. 1962) looks to whether there was a failure to maintain minutes or adequate corporate records, was there a disregard of legal formalities and did two related entities use the same office or business location among

other factors. On the other hand, for example, in the Seventh Circuit, unjust enrichment may alone suffice. *Sea-Land Servs., Inc. v. Pepper Source*, 993 F. 2d 1309, 1312 (7th Cir. 1993).

The wide divergence in veil piercing rules applied throughout Federal and State Courts inevitably leads to an indeterminacy in the standards for veil piercing among such jurisdictions, including California, such that the precedents applying the amorphous doctrine are in fact not precedents at all. As Professor Hoffman observed, "Business planners are left unable to give guidance on how a business and its owners may avoid liability. Litigants and courts are forced to struggle on their own with the law's scattershot approach to defining when the corporate shield may be disregarded." Lonny S. Hoffman, The Case Against Vicarious Jurisdiction, (2004) 152 University of Pennsylvania Law Review 1023, 1077. This aggressive expansion and scattershot application of this doctrine for jurisdictional purposes without limit or definition renders the Due Process Clause effete and without effect to be trumped on every occasion. Indeed, the fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," [*Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring in judgment)], and degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297, that the due process clause is to otherwise provide is turned on its head on the mere allegation that an unjust result will obtain.

World-Wide Volkswagen's concept of fair warning particularly applicable to disputes involving foreign nationals will be easily mooted by the mere talismanic

assertion of alter ego allegations if this decision is permitted to stand. Similarly, this Court's long recognition of the unique and substantial burdens placed upon foreign nationals defending themselves in a foreign country will be gutted if the State of California's decision is left undisturbed. Indeed, this Court's holding that such circumstances should carry significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders will be rendered meaningless in the event jurisdiction is permitted over Petitioners in this case. Despite clear precedent that in every case involving an international defendant, the procedural and substantive interests of other nations in a state court's assertion of jurisdiction, as well as the "Federal interests in Government's foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State, the decision before the Court stands such precedent on its head. In sum, the 'Great care and reserve [that] should be exercised when extending our notions of personal jurisdiction into the international field.' " *Asahi Metal Industry Co. v. Superior Court,* 480 U.S. 102, 115 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987); quoting *United States v. First National City Bank,* 379 U.S. 378, 404 (1965) (Harlan, J., dissenting) will be ignored if the State of California's expansion of the alter ego doctrine is permitted to stand. Accordingly, Petitioner respectfully requests that the instant Petition For Certiorari be granted in its entirety.

CONCLUSION

Weighing all the factors, California's assertion of personal jurisdiction over Petitioners upon a stretched and tortured application of the alter ego doctrine is neither fair nor reasonable and would not comport with the requirements of the Due Process clause of the federal Constitution. Petitioners do not maintain an ongoing or continuous relationship with California and have not purposefully injected themselves into the forum state's affairs. To the contrary, Petitioners have structured their transactions with Comerica to do business in Canada, not the jurisdiction of California. Petitioners are not parties to any agreements with Comerica, they are not personal guarantors of the loans, and they never consented to being subject to jurisdiction in California.

Personal jurisdiction should not be exercised based solely upon theories of imputed and vicarious conduct such as alter ego and conspiracy against foreigners who purposefully structured their contractual arrangements with the plaintiff to avoid being haled into court in California. Comerica could have easily provided for jurisdiction over the Petitioners in the lengthy and extensive loan documents, security agreements, interparty agreements and other documents that were executed as a condition for making the loans. The fact that Comerica, a bank with sophisticated legal representation, did not so provide, makes it patently unreasonable to hale Petitioners into California based solely on allegations of imputed conduct. The State of California should not be improperly enlisted as the scriveners for a new agreement with Petitioners that never existed previously. The Petitioners

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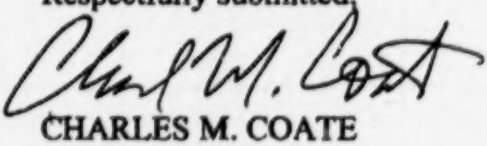
respectfully request that their petition for certiorari be granted.

9/27/05

Respectfully submitted,



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